VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1961 – 1964

REPORTS

OF THE

NATIVE APPEAL COURTS

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AMPTENARE VAN DIE NATURELLE-APPÈLHOWE, 1961.
OFFICERS OF THE NATIVE APPEAL COURTS, 1961.

SENTRALE NATURELLE-APPÈLHOF.
CENTRAL NATIVE APPEAL COURT.

VOORSITTER/PRESIDENT: J. P. COWAN, opgevolg deur/succeeded by N. P. J. O'CONNELL.

PERMANENTE LID/PERMANENT MEMBER: N. P. J. O'CONNELL opgevolg deur/succeeded by R. S. G. GOLD.

NOORDOOSTELIKE NATURELLE-APPÈLHOF.
NORTH-EASTERN NATIVE APPEAL COURT.

VOORSITTER/PRESIDENT: T. W. H. D. RAMSAY opgevolg deur/succeeded by J. P. COWAN.

PERMANENTE LID/PERMANENT MEMBER: V. S. S. KING opgevolg deur/succeeded by R. M. CRAIG.

SUIDELIKE NATURELLE-APPÈLHOF.
SOUTHERN NATIVE APPEAL COURT.

VOORSITTER/PRESIDENT: H. BALK.

PERMANENTE LID/PERMANENT MEMBER: E. J. H. YATES.

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NORTH-EASTERN NATIVE APPEAL COURT.

CASE No. 81 OF 1960.

XAKAZA *v.* ZONDI.

PIETERMARITZBURG: 11th January, 1961. Before Ramsay, President; King and Richards, Members of the Court.

NATIVE LAW.

Isondhlo—when claimable—rejection of civil law wife by maintaining a "customary union wife".

Summary: Claim for maintenance of wife by Christian rites and illegitimate grandchildren by father of wife against husband. Premature claim for isondhlo in respect of children. Husband living with previous customary union wife after marriage by civil law to another woman.

Held: That isondhlo is payable only when maintenance ceases, provided that if the natural guardian refuses or neglects to receive the children being maintained, then isondhlo becomes immediately payable.

Held: That where a man, married to a woman by Native Custom, marries another woman by civil law but persists in living with the first woman, he is deemed to have rejected the civil law wife and is liable to pay isondhlo for her.

Cases referred to: Mkambula *v.* Linda, 1951 (1) S.A. 377 (A.D.).

Appeal from the Court of Native Commissioner, Greytown. King, Permanent Member:—

The brother of a woman, Tryphina, sued Triphina's husband Agrippa, for four head of cattle or value £60 alleging that he had supported Tryphina since 1956 together with three illegitimate children of Agrippa's daughter since 1958 and that he was still supporting them. Defendant resisted the claim, alleging that Tryphina had deserted him and that he did not know her whereabouts.

The Native Commissioner dismissed plaintiff's claim and the plaintiff appealed on the following grounds:—

1. The judgment is against the weight evidence.
2. The learned Native Commissioner erred in holding that Tryphina deserted the defendant.
3. The learned Native Commissioner erred in admitting inadmissible evidence to be produced at the hearing of the action.
4. The learned Native Commissioner erred in holding that the defendant acted *bona fide* in requesting Tryphina to take up residence at his, defendant's brother's house.

Ground 1, 2 and 4 are based on credibility and ground 3 of a point of law.

As the Natal law recorded regarding isondhlo, is not as clear as desirable, three Native Assessors were called in and questions were put to them. Their statements are recorded at the end hereof and are accepted by this Court.

The Native Commissioner who had the benefit of hearing the witnesses has accepted that it was Tryphina who deserted defendant in 1940, that she had resided at plaintiff's kraal since 1956, that since 1958 the three illegitimate children have been residing with the plaintiff, that after defendant became aware of Tryphina's presence in plaintiff's kraal he offered her residence at his brother's kraal close to his own and that Tryphina refused to live at defendant's brother's kraal. These findings will be accepted by this Court.

However, it is also clear from the record that in 1958 the defendant was called upon to remove his wife and he failed to do so. He contends that he was prepared to take her and to place her with his brother while he (himself) remained living with another woman. No wife, even if she is not aware of her rights, can be expected to live at the kraal of her brother-in-law while her husband lives in adultery with another woman and this Court finds that his conduct amounts to a rejection of the woman.

It is quite clear, therefore, that irrespective of what the position may have been prior to 1958 defendant became aware of the woman's whereabouts in 1958, was called upon to accept her and that he rejected her. Isondhlo in respect of her was therefore payable.

So far as the children are concerned, from a study of decided cases and Franklin and Stafford's work "Principles of Native law and the Natal Code" read with the assessors' statements below it is clear that if the defendant is called upon to take the children and fails to do so isondhlo immediately becomes payable. In the present case isondhlo was claimed in respect of the children but the record is silent as to whether or not defendant was called upon to take them. If he was called upon to take them and refused to do so isondhlo is now payable, if not then plaintiff's claim is premature.

The appeal is allowed with costs and the judgment of the Court below is altered to read:—

> "For plaintiff for one isondhlo beast or its value £15 with costs in respect of the claim regarding the woman. Absolution from the instance in regard to the balance of the claim."

At the hearing of the appeal in this Court argument was advanced to the effect that under the Childrens' Act the grandfather of illegitimate children was not responsible for their maintenance. This argument is not applicable in this case. The action has been brought under Native law and under that system the property rights in an illegitimate grandchild lie with the grandfather and he is liable to pay isondhlo, in certain circumstances, to the person maintaining them.

It was further argued on appeal that the payment of one beast per person, irrespective of the period such person had been maintained, was ridiculous. Whether this is so or not is no concern of this Court which must decide the dispute in terms of Native law unless it holds that Native law is not applicable or that it is *contra bonos mores*. Neither of these considerations is applicable.

Assessors:

Chief Manzolwandla Mlaba,

Deputy Chief Shibeka Zuma, and

Induna Nongozolo Mtalane.

Questions and answers: (The replies of the three assessors were unanimous although they were questioned separately.)

1. Is isondhlo payable for a wife who has been driven away by her husband and is being maintained by her father?
   Reply: Yes.
2. Is isondhlo payable by a husband in respect of a wife who deserts?
   Reply: No.
3. If a child is being maintained by someone other than its guardian and it dies is isondhlo payable?
   Reply: Yes.
4. Can a maintainer claim isondhlo while he is still maintaining a child or must he wait until he is finished maintaining the child. What is the position if a father fails or refuses to take back the child?
   Reply: Normally the claim is not made while the child is still with the maintainer but a maintainer may call upon the father to take the child and if the father fails or refuses to take it the maintainer may then claim isondhlo notwithstanding that the child is still with him.

For Appellant: Adv. M. J. Strydom instructed by C. C. C. Raulstone & Co.

For Respondent: Adv. J. A. Niehaus instructed by A. C. Bestall & Uys.

NORTH-EASTERN NATIVE APPEAL COURT.

QWABE *v.* QWABE.

N.A.C. CASE No. 94 OF 1960.

PIETERMARITZBURG: 11th January, 1961. Before Ramsay, President; King and Richards, Members of the Court.

PRACTICE AND PROCEDURE.

Non-signature of notice of hearing (Form N.A. 149) at date of hearing of appeal—Failure of respondent's attorney to trace respondent's whereabouts—Admission of liability reflected on Chief's written record denied on appeal—Correct procedure to rectify.

Summary: At a trial before a chief, defendant is recorded as having admitted liability but on appeal to Native Commissioner he denied the admission. He was allowed to proceed with his defence. At hearing of appeal by Native Appeal Court, respondent, who was unaware of the second appeal, could not be traced by his attorney when notice of hearing of appeal was served. Attoney refused to sign informal notice of hearing.

Held: The chief's written record must be presumed to reflect the true elements of the trial before him and if the correctness of the record is denied the proper procedure is to take action for the correction of the record.

Held: That when the Clerk of Court cannot obtain informal acceptance of notice of hearing of an appeal, it is his duty to take steps to have notice of hearing formally served by messenger of court.

Cases referred to:

Kunene *v.* Madondo, 1955, N.A.C. 75.

Kumalo *v.* Kumalo, 1953, N.A.C. 4.

Dimaza *v.* Gxalaba, 1955, N.A.C. 93.

Malufahla *v.* Kalankomo, 1955, N.A.C. 95.

Am *v.* Kuse, 1957, N.A.C. 92.

Authorities referred to:

Rules 6 (4), 6 (6), 11 (*d*) of Rules for Native Appeal Courts.

Appeal from the Court of Native Commissioner, Nkandla.
Ramsay, President:—

In this matter an attorney represented the plaintiff in the Native Commissioner's Court in an appeal from a Chief's Court and won his case. The defendant appealed through his legal representative and the hearing of the appeal was set down for the 25th November, 1960. The Clerk of Court, Nkandla, in due course, sent notices of hearing (Form N.A. 149) of the appeal to both parties' legal representatives for signature. Defendant's attorney on the 5th November, 1960, signed and returned the notice of hearing but plaintiff's representative did not do so.

On the 16th November, 1960, the Registrar of this Court telegraphed the latter attorney that the appeal would be heard on the 25th November, 1960, and the attorney replied by letter dated 16th and received on the 21st November, 1960, as follows:—

> " I duly received your telegram of even date advising that this appeal would be heard in Pietermaritzburg on the 25th instant. As I have received no instructions whatsoever from my client, I regret that I shall not be able to represent him. I have written to him two or three letters and the Clerk of Court, Nkandla, promised to get in touch with him but I have heard nothing from any source."

A copy of the notice of appeal was presumably served on the plaintiff's attorney by defendant's attorney in terms of rule 6 (4) of the Rules for Native Appeal Courts. It is not known whether Rule 6 (6) was complied with. If not no appeal has been noted. If the sub-section has been complied with the plaintiff's attorney must be considered as still representing his client for purposes of the appeal, a position from which, in respect of an appeal to the Supreme Court, he could retire only with permission of the Court. There is no rule on the point in this Court, but such attorney would be morally bound to notify the Clerk of Court with whom the notice of appeal was lodged and also the appellant's attorney that he is no longer representing the respondent. It is not known if this was done. If it was done, then it became the duty of the Clerk of Court to call upon the appellant's attorney to deposit sufficient funds with him to have the notice of hearing served by the Messenger of Court, in terms of Rule 11 (*d*). It is again not known if this was done.

The Registrar is instructed to ascertain from the Native Commissioner of Nkandla the position in respect of the three points raised above.

The matter is brought in issue by the appearance in Court to-day (25th November, 1960) of an advocate on behalf of the appellant, who informs the Court that he has received no notification that no notice of hearing has been received from respondent and that consequently the appeal cannot be heard today. He claims his costs.
Postea.

On the 11th January, 1961, the matter again came before this Court and the Registrar handed in a reply from the Native Commissioner of Nkandla. From this it appears that Rule 6 (6) of the Rules for Native Appeal Courts was not complied with, the attorney who represented the respondent in the Court below did not notify the Clerk of Court that he was withdrawing from the case and the Clerk of Court did not call upon the appellant's attorney for funds to have the notice of hearing formally served. The Clerk of Court, however, has succeeded in obtaining the respondent's mark on the notice of hearing so the appeal may proceed. As the respondent appears in person and makes no protest, the lack of compliance with Rule 6 (6) is condoned. It would merely entail further delay and expense were the appellant to be required to receive the notice of appeal in a manner consistent with the rules. There is no prejudice to the respondent.

In regard to the claim for costs by appellant's counsel at the first hearing of this matter before this Court, his request is refused as his attorney failed to comply with Rule 6 (6) and was thus partly responsible for the abortive proceedings on that occasion.

To deal with the merits of the case, the plaintiff sued defendant in a Chief's Court, the claim, according to the written record, being "Seven beasts used by plaintiff's and defendant's father for defendant's house benefit."

The defendant's reply is "admits liability".

Judgment was given in the Chief's Court for plaintiff for seven beasts and costs. Defendant unsuccessfully appealed to the Native Commissioner's Court and now comes to this Court on numerous grounds which it is unnecessary to consider.

Defendant by his admission of liability in the Chief's Court, is estopped from further proceeding in defence.

Defendant states in evidence: "Before the Chief I denied the claim. Immediately after judgment I appealed". Defendant and plaintiff were both represented by legal practitioners in the Native Commissioner's Court so there can be no question of ignorance of procedure on the part of the defendant—he has been sadly misadvised by his attorney.

The Chief's written record must be presumed to reflect the true elements of the trial before him.

In Kumalo *v.* Kumalo, 1953, N.A.C., 4, it was held: As the criterion is the Chief's written record and, as the correctness of the record has not been challenged, the particulars contained therein fall to be accepted as reflecting the true position and will therefore be so regarded.

This decision was followed in Kunene *v.* Madondo 1955 N.A.C., 75 (which detailed the procedure for rectification of an incorrect Chief's record), Dizama *v.* Gxalaba 1955 N.A.C., 93; Malufahla *v.* Kalankomo 1955 N.A.C., 95 and Am *v.* Kuse 1957 N.A.C., 92 in which the questioning of the correctness of the Chief's record was precluded on appeal.

Counsel for appellant who was defendant in the Court below made much of the argument that the facts disclosed in the evidence negatived the plea of consent in the Chief's Court and that such an admission of liability was in conflict with law and justice. These arguments are of no avail. This Court must decide whether the Native Commissioner was right or wrong in his decision. The Native Commissioner was wrong right at the commencement of the proceedings before him. The pleadings before him, contained in the Chief's written record, contained a

claim, an open admission of liability and a judgment. He should have held that the admission of liability without any reservations precluded the defendant from proceeding further in the matter. If, then, the correctness of the written record was queried, he should have advised the defendant of the proper procedure to have the matter thrashed out.

At that stage the Native Commissioner had no knowledge of the merits of the case.

This remedy is still open to the present appellant.

If Native Commissioners in appeals from Chiefs would only apply Rule 12 (3) of the Rules for Chief's Courts, it would make matters much easier for themselves and for this Court.

The appeal is dismissed with costs.

For Appellant: J. H. Niehaus instructed by A. C. Bestall & Uys.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

MDODA MADLALA *v.* KOKI MADLALA.

N.A.C. CASE No. 104 OF 1960.

PIETERMARITZBURG: 9th January, 1961. Before Ramsay, President: King and Richards, Members of the Court.

PRACTICE AND PROCEDURE.

New plaintiff substituted by consent while case on appeal to Court of Native Commissioner from Chief's Court.

Summary: A woman sued in a Chief's Court and obtained judgment. Defendant appealed and during hearing by Native Commisioner it was realised that she had no *locus standi* and by agreement her guardian was substituted as plaintiff.

Held: That it is incompetent to substitute a new individual for one of the parties in a case once a judgment has been delivered.

Appeal from the Court of the Native Commissioner, Impendle.

(Only excerpts from judgment are given.)

Ramsay, President:—

Koki Madlala, a woman, assisted by one Mphucuka Madlala, sued defendant in a Chief's Court for five head of cattle. No cause of action is stated. Defendant denied liability and the Chief gave judgment in favour of plaintiff for five head of cattle and costs.

Defendant appealed to the Native Commissioner's Court where both parties were represented by legal practitioners. The note appears on the record: "By agreement Mphucuka Madlala is substituted as plaintiff and matter of costs to stand over". In due course the Native Commissioner dismissed the appeal with an order as to costs.

An extraordinary position is thus created. As the appeal is dismissed, the Chief's judgment stands, but the Chief's judgment is in favour of Koki Madlala, not Mphucuka Madlala. The Chief gave judgment for Koki Madlala, but on appeal the Native Commissioner's Court gave a judgment purporting to be in favour of Mphucuka Madlala.

It is disquieting to find that a Native Commissioner, a barrister-at-law and an attorney-at-law could consider that it was right and in order to substitute another person for the respondent in an appeal at the hearing of the appeal and after a judgment of a competent Court had been delivered.

The appeal is allowed and, as the evidence discloses that in the Chief's Court the wrong party sued, the Chief's judgment is set aside and the claim before him dismissed. As the Chief as well as the parties before him erred, there will be no order as to costs in the Chief's and Native Commissioner's Courts. Similarly, there will be no award of costs in this Court as the point on which this decision was made was not raised on appeal.

The notice of appeal contains argument on the evidence taken, which is out of order. Paragraphs 1 to 5 thereof could have been summed up in the sentence: "The judgment is against the weight of evidence".

King and Richards, Members of the Court, concur.

For Appellant: Adv. J. A. van Heerden instructed by C. C. C. Raulstone & Co.

For Respondent: Adv. J. J. Kriek instructed by Jasper R. N. Swain & Co.

NORTH-EASTERN NATIVE DIVORCE COURT.

SEITSHIRO *v.* **SEITSHIRO.**

N.D.C. CASE No. 259 OF 1960.

PRETORIA: 25th January, 1961. Before Ramsay, President.

DIVORCE ACTION: AGREEMENT NOT TO DEFEND.

Held: That a consent not to defend and to accept a restitution order is not an undertaking not to comply with the order.

(Relevant portion of judgment):—

Ramsay, President:—

Plaintiff summoned defendant for restitution of conjugal rights. Defendant pleaded admitting desertion and agreed to an order for restitution on condition no costs were claimed against her.

On the day of the final order defendant gave evidence to the effect that she attempted to restore conjugal rights but that plaintiff refused to accept her.

It was argued that on her plea she committed herself not to restore conjugal rights and, in effect, agreed to a divorce.

It was held that this argument could not be supported and that defendant's intention could, just as reasonably, have been an intention to resume the marriage and to relieve plaintiff of the necessity to prove desertion.

For Plaintiff: Mr. H. Belling (Getz. Ogus. Behr and Jaffit).

Defendant in person.

NORTH-EASTERN NATIVE DIVORCE COURT.

DITSHEGO *v.* DITSHEGO.

N.D.C. CASE No. 294 OF 1960.

PRETORIA: 25th January, 1961. Before Ramsay, President.

DIVORCE ACTION: RESTITUTION.

Held: That an attempt at restitution of conjugal rights may anticipate service of the written order to restore conjugal rights.

(Relevant portion of judgment):—

Ramsay, President:

Plaintiff obtained an order of restitution of conjugal rights against defendant. Before the restitution order was served on defendant she attempted to return to her husband but states she was repulsed. She made no further attempt. It was argued by plaintiff's attorney that his client should be granted his final decree as defendant had not complied with the written order served on her.

It was held that the actual restitution order is the pronouncement by the presiding officer in Court as reffected by his written judgment. The document served on the defendant is merely a notification of that judgment. The defendant, accordingly, is at liberty to comply with the order, or to attempt to do so, even before service of the document is made on her.

For Plaintiff: Mr. J. H. Gillet (Gillett & Odendaal).

Defendant in person.

NORTH-EASTERN NATIVE DIVORCE COURT.

CASE No. 458 OF 1960.

GUMEDE *v.* GUMEDE.

PRETORIA: 2nd February, 1961. (Judgment delivered at Pietermaritzburg on 10th February, 1961). Before Ramsay, President.

DIVORCE: PRACTICE AND PROCEDURE.

Failure of defendant to comply with Court Order—Precluded from being heard until contempt purged.

Summary: In interim proceedings defendant was ordered to pay a contribution of £20 towards plaintiff's costs in instituting an action for judicial separation. He failed to do so. In a further interim action for maintenance *pendente lite,*

Held: That defendant being in contempt, could not be heard until he had complied with the Order of Court.

Case referred to:

Kotze *v.* Kotze, 1953 (2) S.A. 184.

Ramsay, President (only the relevant portions of the judgment are given):—

In this matter plaintiff issued summons in October, 1960, on defendant, a municipal policeman, claiming—

(*a*) an order for judicial separation;

(*b*) forfeiture of the benefits of the marriage;

(*c*) custody of the minor child born of the marriage;

(*d*) maintenance for the said child at the rate of £3 *per mensem*;

(*e*) alimony for plaintiff at the rate of £7 *per mensem*;

(*f*) alternative relief;

(*g*) costs.

The hearing was set down for the 2nd February, 1961.

In the interim plaintiff applied for a contribution towards the costs of the action and for maintenance *pendente lite*. An order for a contribution of £20 was made on the 11th October, 1960, by this Court, but the application for maintenance was refused.

On the 2nd February, 1961, the matter for the first time came before me, not on the main claim, but on a petition for maintenance at the rate of £10 *per mensem*. The petition discloses that the plaintiff gave birth to a second child in December, 1960, and so is not in a position to be employed, that in her previous application she mistakenly stated that there was a Native Commissioner's order that defendant had failed to pay the £20 ordered and that she was unable to prosecute the case until that amount was paid. She now asked for a maintenance order of £10 a month for herself and her two children, *pendente lite*.

The defendant in a replying affidavit disclaims parentage of the second child, states plaintiff's parents are well able to support her and pleads he is unable to pay the £20 contribution to costs and any maintenance as his salary is £20 a month, he has to support himself and his mother, pay rent, pay instalments on his car and had to pay £15 for repairs to his car.

Quite apart from the fact that defendant does not state what his rental and cost of maintaining himself and his mother amount to, and why his car, which he does not require to pursue any business or calling, should be deemed to be more important than an order of this Court, the defendant by being in contempt of Court, is debarred from being heard by this Court. In Kotze *v.* Kotze 1953 (2) S.A. 184, in somewhat similar circumstances, is was held that as respondent was in contempt of an order of Court, he should not be heard unless there were circumstances present which entitled him to be heard and it was further held that there were no such circumstances in that case.

It remains for this Court to ascertain whether there are circumstances in the present case justifying that defendant be heard. His excuse for not paying the £20 contribution to costs ordered is that he had to pay £15 for repairs to his car. Defendant who states his salary is £20 a month and who is legally obliged to maintain his wife and children, is not obliged to maintain a motor car and it is difficult to see how he can afford to keep both. He has not shown that the second child is not his and admits that the time lapse is insufficient to prove that he is not the father of the child. Although he states that on an occasion he found his wife in compromising circumstances with another man, he has taken no steps to follow up that allegation.

I can thus find no circumstances to justify defendant being heard while he is in contempt of Court.

For Applicant: Adv. N. Kades, insrtucted by Henry Helman.

For Respondent: Mr. R. Schilz, instructed by Fisher & Van den Berg.

SOUTHERN NATIVE APPEAL COURT.

MAYEKI *v.* QUTU.

N.A.C. CASE No. 33 OF 1960.

UMTATA: 25th January, 1961. Before Balk, President; Yates and Henning, Members of the Court.

Illegitimate child—Property rights of natural father where full "fine" for seduction and pregnancy of mother paid but not isondhlo *beast.*

NATIVE CUSTOM.

Summary: The plaintiff (now appellant) sued the defendant (present respondent) for nine head of cattle, later reduced to eight head, averring in his summons *inter alia,* that the cattle represented the dowry paid for one Mpunguzake of whom his late brother, Mtiya, was the natural father; that Mtiya had paid the customary fine in full for the seduction and pregnancy of Mpunguzake's mother which resulted in the former's birth.

The defendant in his plea admitted the alleged seduction and pregnancy and that it had resulted in Mpunguzake's birth, but denied that the full fine had been paid.

After the plaintiff had given evidence in the course of which he stated that the full fine viz., one beast and £20, representing a further four head of cattle, had been paid for the seduction and pregnancy, the Native Commissioner consulted the Native assessors called by him, on the question whether the natural father of a girl was entitled to the dowry paid for her if he had paid the "fine" for the seduction resulting in her birth at the time of seduction but only tendered the isondhlo beast at a later date.

The majority of the assessors replied in the negative.

The Native Commissioner adopted their view and entered judgment for the defendant.

The appeal is from that judgment and is brought on grounds which amount to this, that the majority opinion of the assessors was erroneous.

Held: It is settled law that amongst the Cape Nguni tribes the property rights in the daughter of a spinster vest in such daughter's natural father as soon as he has paid the full "fine" for the spinster's seduction and pregnancy which resulted in the daughter's birth, and that he then becomes entitled to any dowry which may be paid for the daughter even though he may not yet have paid the isondlo beast for her, it sufficing if an allowance is made for this beast when the dowry is claimed as was done in the instant case.

Cases referred to:

Seymour's Native Law in South Africa (Second Edition) at at page 152.

Xoliwe *v.* Daubla, 4 N.A.C. 148.

Matinise *v.* Malote, 1936, N.A.C. (C and O) 121.

Appeal from the judgment of the Native Commissioner at Idutywa.

Balk (President):—

An application brought *in limine* to strike this appeal off the roll on the ground that the notice of appeal was bad in law was refused by this Court for the reasons which will appear later in this judgment.

Good cause having been shown, the late noting of the appeal was condoned.

The plaintiff (present appellant) sued the defendant (now respondent) in a Native Commissioner's Court for nine head of cattle, less an isondlo beast, averring *inter alia*, in his summons that—

(*a*) the nine cattle had been received by the defendant as dowry for one Mpunguzake;

(*b*) the latter was the natural daughter of his (plaintiff's) late brother, Mtiya, whose heir he was;

(*c*) Mtiya had paid the customary "fine" of five head of cattle or their equivalent for the seduction and pregnancy which had resulted in Mpunguzake's birth.

In his plea the defendant admitted the seduction and pregnancy and stated that one beast and £15 had been paid as damages therefore and that he had received eight head of cattle as dowry for Mpunguzake but denied that the plaintiff had any right to these cattle alleging that they belonged to one Zekelo, the heir of Mpunguzake's late father. The defendant did not deny in his plea that the seduction and pregnancy resulted in Mpunguzake's birth so that the plaintiff's averment in this respect must be taken to have been admitted by the defendant.

At the commencement of the trial in the Native Commissioner's Court, the plaintiff reduced his claim to eight head of cattle less an isondlo beast.

After the plaintiff had given evidence in the course of which he stated that the full "fine" viz., one beast and £20, representing a further four head of cattle, had been paid for the seduction and pregnancy, the Native Commissioner consulted the Native assessors called by him, on the question whether the natural father of a girl was entitled to the dowry paid for her if he had paid the "fine" for the seduction resulting in her birth at the time of seduction but only tendered the isondlo beast at a later date.

The majority of the assessors replied in the negative.

The Native Commissioner adopted their view and entered judgment for the defendant.

The appeal is from that judgment and is brought on grounds which amount to this, that the majority opinion of the assessors was erroneous. As pointed out by Mr. Muggleston in his argument for the respondent in the matter of the application to strike the appeal off the roll, the criterion is not the assessors' opinion as to the Native law and custom obtaining on the point in question, but the Native law and custom on this point as applied by the Native Commissioner in deciding the case. However, as submitted by Mr. Knopf on behalf of the appellant, the grounds of appeal read with the record lead to but one conclusion, viz., that the Native Commissioner's judgment is being attacked on appeal on the ground that he erred in his view in applying the majority opinion of the assessors on the custom in question in deciding the case so that the notice of appeal falls to be regarded as valid; see Mbulawa *v.* Mbulawa 1956 N.A.C. 104 (S), at page 106.

It is settled law that amongst the Cape Nguni tribes the property rights in the daughter of a spinster vest in such daughter's natural father as soon as he has paid the full "fine" for the spinster's seduction and pregnancy which resulted in the daughter's birth, and that he then becomes entitled to any dowry which may be paid for the daughter even though he may not as yet have paid the isondhlo beast for her, it sufficing if an allowance is made for this beast when the dowry is claimed as

was done in the instant case; see *Seymour's Native Law in South Africa* (Second Edition) at page 152 and the authorities there cited, in particular, Matinise *v.* Malote 1936 N.A.C. (C. and O.) 121 at pages 123 and 124, relied upon by Mr. Knopf. That this custom also obtains in the magisterial district from which the instant case emanates i.e. in the Idutywa district, receives specific confirmation from the judge in Xoliwe *v.* Dabula 4 N.A.C. 148.

It follows that the Native Commissioner was wrong in his view of the custom as applied by him in deciding this case so that the defendant was not entitled to judgment.

The appeal should, accordingly, be sustained with costs, and the judgment of the Native Commissioner's Court should be set aside and the case remitted to that Court for trial to a conclusion on the merits.

Yates and Henning, Members, concurred.

For Appellant: Mr. R. Knopf, of Umtata.

For Respondent: Mr. M. Muggleston, of Umtata.

SOUTHERN NATIVE APPEAL COURT.

JAFTA *v.* MAQABAZA.

N.A.C. CASE No. 46 OF 1960.

UMTATA: 26th January, 1961. Before Balk, President; Yates and Johnson, Members of the Court.

PRACTICE AND PROCEDURE.

Irregularity taken on appeal instead of review—Competency of Duty of Attorney to apply for recall of witness for cross-examination—no onus on Court in this respect.

Summary.—After the judgment debtor in an interpleader action had given evidence in chief, the hearing of the case was postponed at the instance of the claimant's attorney. The hearing was again adjourned and at its resumption further evidence was adduced and the case concluded. The claimant's legal representative did not at the resumed hearing, at which the case was concluded, apply for the recall of the judgment debtor for the purpose of cross-examination.

The claimant was at the resumed hearing in the Native Commissioner's Court, represented by a legal practitioner other than the one who represented him at the initial hearing in that Court.

The appeal was bought on the ground, *inter alia,* that owing to the omission to cross-examine the judgment debtor, the trial and hearing of the case was irregular and had resulted in prejudice to the claimant.

Held: That it was competent to bring the allegation of irregularity by way of appeal instead of review, as there were also other grounds of appeal properly brought as such.

Held further: That the onus of having the witness recalled rested on the claimant's attorney and not on the presiding Native Commissioner so that there cannot be said to be any irregularity on the latter's part in this respect.

Cases referred to:

Mngxunva *v.* Tyikana, 1958, N.A.C. 44 (S), at page 47.

Distillers Korporasie (S.A.) Bepk. *v.* Kotze, 1956, (1) S.A. 357 (A.D.), at page 361.

Heard at Umtata on the 1st February, 1961.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court in an interpleader action declaring a certain *mzondo* cow and its red bull calf to be excutable, with costs.

The appeal is brought by the claimant on the following grounds:—

"1. The judgment is against the weight of the evidence, the facts proved and the general probabilities and circumstances of the case and the defendant failed to discharge the onus upon him and the judgment should have been for plaintiff.

2. The trial and hearing of the case was irregular and the defendant suffered irreparable prejudice in that on the 17th February, 1960, when the matter was first heard the defendant's witness, Rachel Sibula, did not conclude her evidence in chief and was not cross-examined on that date and her cross-examination was reserved to a later date, but according to the record there is no entry of this fact and on the 21st July, 1960, when the trial was resumed, the plaintiff's legal representative was not given an opportunity of cross-examining the witness and there is nothing on the record to indicate that he was given such an opportunity and failed to avail himself of it. Probably due to an oversight on the part of the Court, he was not informed that he still had to cross-examine the witness, Rachel Sibula, and such plaintiff's legal representative was acting on behalf of plaintiff's attorney who was absent and the said legal representative had not appeared on the 17th February last and as the witness Rachel Sibula is the most important defence witness, the plaintiff, suffered irreparable prejudice by the irregularity of the trial.

3. The judgment is bad in law in that even if Clarence Sibula and Rachel Sibula were married in (*sic*) community of property:—

(*a*) There is no evidence that community of profit and loss were also excluded and no evidence that the *mzondo* cow and calf, the subject of the dispute were acquired by Rachel Sibula before her marriage to Clarence Sibula.

(*b*) There is no evidence that the marital power of Clarence Sibula over his wife, Rachel Sibula, was excluded and as Clarence Sibula presumably had the marital power over Rachel, he had the right to administer her estate and to alienate and and dispose of her property without reference to her and Rachel would have no right of recourse to third parties who acquired her property from Clarence Sibula."

In the foregoing grounds of appeal, the claimant is referred to as the plaintiff, the judgment creditor (respondent) as the defendant and the judgment debtor by her name, Rachel Sibula.

It was accepted in the Native Commissioner's Court by the parties that the onus of proof rested on the judgment creditor as the cattle had been attached in the claimant's possession.

The President dealt with the appeal on fact, i.e. grounds 1 *and* 3, *and found that the judgment creditor had discharged the onus of proof resting on him. The President then proceeded as follows:—*

Turning to the remaining ground of appeal, i.e. the second ground, it would appear that it is competent for this Court to determine the issue raised in that ground by way of appeal instead of review in that the Native Commissioner's judgment is also attacked on other grounds, i.e. on the merits, which are properly brought by way of appeal. That this is the position is apparent from the judgment in Distillers Korporasie (S.A.) Bpk. *v.* Kotze 1956 (1) S.A. 357 (A.D.), at page 361, cited by Mr. Muggleston, where a similar course was adopted.

Proceeding to a consideration of the merits of this ground of appeal, the record shows that after the judgment debtor had given her evidence in chief, the hearing of the case was postponed at the instance of the claimant's attorney. The hearing was again adjourned and at its resumption futher evidence was adduced and the case concluded. The claimant's legal representative did not, at the resumed hearing at which the case was concluded, apply for the recall of the judgment debtor for the purpose of cross-examination. The onus of having this witness recalled for that purpose rested on him and not on the presiding Native Commissioner, so that there cannot be said to be any irregularity on the latter's part in this respect. The fact that the claimant was at the resumed hearing in the Native Commissioner's Court represented by a legal practitioner other than the one who represented him at the initial hearing in that Court does not affect the position as it was the duty of the attorney who initially appeared, to instruct the legal practitioner who appeared at the resumed hearing at his behest, to apply for the recall of the judgment debtor for cross-examination; and even if he did not do so, it was for the legal practitioner appearing at the resumed hearing to satisfy himself of the position by reading the record which, according to the Native Commissioner, was made available to him before the commencement of the resumed hearing for that purpose.

Consequently, the second ground of appeal also fails and the appeal should be dismissed, with costs.

Yates and Johnson, Members, concurred.

For Appellant: Mr. K. Muggleston, of Umtata.

For Respondent: Mr. R. Knopf, of Umtata.

SOUTHERN NATIVE APPEAL COURT.

JABE *v.* **BOQWANA.**

N.A.C. CASE No. 47 OF 1960.

UMTATA, 26th January, 1961. Before Balk, President; Yates and Henning, Members of the Cour.

NATIVE CUSTOM.

Adultery—A payment as ntlonze *by alleged adulterer is acknowledgement that full "fine" for the adultery is owing by him.*

Summary: Plaintiff (now respondent) sued the defendant (present appellant) for two head of cattle or their value, R40.00, averring that this was the balance of the "fine" due to him in respect of the defendant's adultery with his wife, Nojongile, as R20.00 had already been paid by the defendant

on account. The defendant in his plea denied the adultery and alleged that the R20.00 had been brought by his relatives without his authority to secure his release and had not been paid to the plaintaff but was in the keeping of the headman.

Held: That, according to the evidence adduced, the amount of R20.00 had been paid with the consent of the defendant as *ntlonze* and, therefore, as an acknowledgment that the full "fine" for adultery was owing.

Cases referred to:

Ntloko *v.* Tseku, 3 N.A.C. 257, at page 258.

Appeal from the judgment of the Assistant Native Commissioner at Willowvale.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the defendant (present appellant) for two head of cattle or their value, £20, averring that this was the balance of the "fine" due to him in respect of the defendant's adultery with his wife, Nojongile. as £10 had already been paid by the defendant on account.

In his plea the defendant denied the alleged adultery and that £10 had been paid on account of the "fine" and alleged that the £10 had been brought by his relatives without his authority to secure his release and that this sum had not been paid to the plaintiff or his representative but was in the keeping of the Headman.

The appeal is brought on the following grounds:—

"1. The judgment is bad in law and against the weight of evidence and is not supported thereby.

2. The discrepancies in the testimonials (*sic*) of Kolben and Monqezi and the role of Nqaideyi's wife should have caused the learned assistant Native Commissioner to find that adultery never took place as alleged or at all.

3. The evidence of the District Surgeon and Headman Bawana regarding the nature and extent of the assault on Kom Malukwe completely disproves the explanation of Kolben and Monqezi and brings Kom Malukwe's (defendant's) allegations of compulsion fully within the probabilities."

According to the evidence given for the plaintiff by his nephew, Monqezi, the latter was told in the evening of New Year's Day, 1960, by one Mabuya, a relative of the defendant, that he was taking a message to Nojongile that the defendant would be visiting her that night. The plaintiff was away at work at the time and one, Kolben, was in charge of his kraal at which Nojongile, with whom the plaintiff had contracted a customary union, was living. After receiving this information, Monqezi fetched Kolben and Veyishile and went with them to the plaintiff's kraal that night where they caught the defendant with Nojongile in the sleeping hut which was in darkness. The defendant tried to escape by striking at Kolben. They struck the defendant a number of blows with their sticks eventually felling him. They took the defendant back to the plaintiff's kraal. A number of men were collected immediately. The defendant promised to pay three head of cattle, describing them. Later Sub-Headman Mbovane, who had also been sent for, came and the defendant admitted to him that he had been caught in adultery with Nojongile and also mentioned that he had already offered three head of cattle. He also told Sub-Headman Mbovane that he had been Nojongile's lover for two years. The

defendant's relatives, Mankenkana and Paula, whom he had been given an opportunity to send for, arrived and paid £10 on his behalf pending payment of the "fine" in full. At the instance of Headman Bawana, who had also been called, the defendant left his blanket. Both the blanket and £10 were left in the keeping of Sub-Headman Mbovane.

Kolben's testimony for the plaintiff fully bears out that of Monqezi. It also discloses that the defendant's relatives came with their own *ibandla* and that, after speaking to the defendant, they paid £10 on account of the "fine" and undertook to pay the balance later.

Sub-Headman Mbovane's evidence for the plaintiff confirms that the defendant made the admissions testified to by Monqezi and Kolben and that the £10 had been paid on account of the "fine". The Sub-Headman added that the defendant's elder brother had tendered this sum as *ntlonze* that he was admitting liability after he had conferred with the defendant and obtained his consent to the payment. The Sub-Headman's evidence also discloses that the defendant admitted to him that he had been struck by the plaintiff's people whilst trying to escape on being caught in adultery with Nojongile.

The defendant's witness, Ndabazongeni, also confirmed that the defendant had admitted that he had been caught in adultery with the plaintiff's wife and that he had received his injuries when he fled from the plaintiff's hut.

In his evidence the defendant denied that he had ever committed adultery with Nojongile. His version of what occurred on the night in question is that whilst passing the plaintiff's kraal on his way home, Kolben, Monqezi and Veyishile assaulted him with sticks after Kolben had asked him what had brought him there. He lost consciousness. When he came to he found them taking him to the plaintiff's kraal. There they assaulted him. At their instance he named his younger brother, Mabuya, as his go-between. He described three head of cattle. His relations came. They were given an opportunity of speaking to him and did so. They did not mention any payment. He remained in the hut and was not present at the discussion outside. He was very weak and bled profusely. His statement to the Sub-Headman that he had been intimate with Nojongile for two years was made in the hope that he would be released. He adhered to the admissions which Kolben, Monqezi and Veysishile had extracted from him because he was still afraid on account of the assult. He first gave the correct version when he came to the Police.

There are, as stressed by Mr. Muggleston in his argument for appellant, unsatisfactory features in the plaintiff's case. According to Monqezi's and Kolben's evidence, they acted at the former's instance on information obtained by him from Mabuya in catching the defendant in adultery with Nojongile whereas Sub-Headman Mbovane's testimony discloses that at the gathering held at the plaintiff's kraal after the alleged catch, Kolben had stated that the catch was made at his instance as a result of his having gone to the plaintiff's kraal to fetch beer and having heard voices in the plaintiff's hut. In this respect the Sub-Headman's evidence is borne out by that of Headman Bawana for the defendant. The headman's evidence also reveals that Monqezi's statement at the gathering at the plaintiff's kraal differed from his evidence as at that gathering Monqezi had told him that he had seen the defendant having a private talk with Mabuya at the latter's kraal and had watched him as he had prior knowledge of the affair between the defendant and Nojongile; further, that he saw the defendant leave Mabuya's kraal and enter the plaintiff's hut whereupon he fetched Kolben and Veyishile and they caught the defendant. The plaintiff's witness,

Ndabazongeni, denied that Monqezi's and Kolben's statements at the gathering at the plaintiff's kraal conflicted with their evidence in the respects testified to by the Headman and Sub-Headman and stated that their statements there corresponded with their evidence.

To my mind, these conflicting statements assume little significance in the light of the defendant's adherence to his admissions that he had been caught in adultery with Nojongile and had been assaulted whilst attempting to escape, coupled with his statement to the Sub-Headman that he had been intimate with her for two years. It is true that the evidence shows that the defendant was very severely assaulted by Kolben, Monqezi and Veyishile and that he stated that he adhered to his admissions because he was still afraid on account of the assault. But, it is difficult to accept this explanation seeing that the defendant continued to adhere to his admissions even after the Sub-Headman and Headman, both of whom are related to him, and his close relatives, whom he had sent for, had arrived at the plaintiff's kraal accompanied by their *ibandla* when he must have realised that it was safe for him to divulge the truth. Here it must also be borne in mind that the Headman's attitude at the plaintiff's kraal indicated that he was not afraid to do his duty in that he took the defendant away to the Police to lay a charge of assault against Kolben, Monqezi and Veyishile and notwithstanding this, the defendant did not repudiate his admissions until he got to the Police. Another factor indicating that his admissions were genuine and not prompted by fear is that he agreed to his relatives paying the £10 on his behalf, as testified to by the Sub-Headman, it being inconceivable that they did not mention to the defendant that they proposed to make this payment when they spoke to him at the plaintiff's kraal, as alleged by him, regard being had to custom. That this money was paid as *ntlonze* and, therefore, as an acknowledgment that the " fine " for the adultery was owing, as testified to by the Sub-Headman, and not in order to secure the defendant's release as alleged by the defendant's witness, Mkonki, is clear from the fact that this is the significance of such payment according to custom, see Ntloko *v.* Tseku 3 N.A.C. 257, at page 248. Finally, the defendant's intimation to the Sub-Headman that he had been intimate with Nojongile for two years was, as is manifest from his own evidence, not prompted by Kolben, Monqezi and Veyishile and his explanation that that statement was made by him in the hope that he would be released is, in the circumstances, obviously unacceptable.

These factors which were relied upon by the Assistant Native Commissioner and stressed by Mr. Airey on behalf of the respondent, make it difficult to escape the conclusion that the defendant did in fact commit the adultery alleged in the summons so that the Assistant Native Commissioner's finding for the plaintiff cannot be said to be wrong.

It should be added that the submission on behalf of the appellant that the evidence that the plaintiff's wife, who was not called as a witness, was hostile to him, favoured the defendant's case, is without substance as her attitude may have been prompted by considerations other than that the adultery did not take place.

In the result the appeal should be dismissed with costs.

Yates and Henning, Members, concurred.

For Appellant: Mr. K. Muggleston, of Umtata.

For Respondent: Mr. F. G. Airey, of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MBANJWA AND ANO. *v.* CIYA.

N.A.C. CASE No. 60 *of* 1960.

UMTATA: 30th January, 1961. Before Balk, President; Yates and Parsons, Members of the Court.

NATIVE CUSTOM.

Dowry agreement entered into by father acting on behalf of his son, binds the latter.

Summary: The facts appear in the excerpts from the President's judgment.

Held: That a dowry agreement entered into by a father on behalf of his son, binds the son even though the latter was absent at the discussion when the agreement was reached.

Cases referred to:

Seymour's Native Law in South Africa (Second Edition) at page 108.

Mbonjiwa *v.* Scellam, 1957, N.A.C. 41 (S), at page 43.

Appeal from the judgment of the Assistant Native Commissioner, Umzimkulu.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) for the relief prayed, with costs, in an action in which he sued the two defendants (present appellants), jointly and severally, for four head of cattle or their value, £8 each, averring in his summons that this was the outstanding agreed-upon balance of the dowry in respect of the marriage by Christian rites of his daughter, Nomasalina, to the first defendant, the son of the second defendant.

In their plea the defendants denied the alleged agreement to pay the additional four head of dowry cattle claimed so that the onus of proof rested on the plaintiff.

The appeal is brought on the following grounds:—

"1. The judgment is against the weight of evidence and probabilities of the case.

2. In view of the numerous discrepancies in, and the unsatisfactory nature of the evidence given by the plaintiff and his witness the learned Judicial Officer erred in accepting such evidence as against that of the defendants.

3. Having found that the determination of the case depended on a question of credibility, and that there were discrepancies in the plaintiff's evidence, the learned Judicial Officer erred in then finding that the discrepancies did not materially affect the plaintiff's case.

4. In view of the fact that it was not established that this was a case where the amount of dowry was fixed by custom, the learned Judicial Officer erred in taking into account the fact that the actual dowry paid by defendants was a relatively small amount.

5. Plaintiff's evidence having not established that defendant No. 1 was a party to the alleged agreement, the learned Judicial Officer erred in finding that the plaintiff has established the agreement as alleged in plaintiff's Particulars of Claim."

It is common cause that the first defendant married the plaintiff's daughter, Nomasalina, by Christian rites and that six head of cattle were paid by the second defendant as dowry for her prior to the day of the marriage.

After dealing with the other grounds of appeal the President proceeded as follows:—

Turning to the remaining ground of appeal, the Assistant Native Commissioner found that the agreement to pay an additional four head of cattle had been concluded between the plaintiff and the second defendant but did not mention that the first defendant was also a party to this agreement. It seems to me that, in view of the discrepancy mentioned above, a finding that the first defendant was present at the discussion when the agreement was reached is not justified. This factor, however, is not fatal to the plaintiff's case aginst the first defendant in that, as is manifest from the evidence, the second defendant, in his capacity as the father of the first defendant acted for the latter in making the dowry agreement and in accordance with custom, therefore, bound the first defendant to all the terms of the agreement, including the payment of the further dowry, irrespective of whether or not the first defendant was present when the agreement was made and of the fact that the second defendant bound himself to pay the further dowry. Here it should be mentioned that the Assistant Native Commissioner applied Native law in deciding the case and that this aspect is not attacked on appeal.

In the result the appeal should be dismissed with costs.

Yates and Parsons, Members, concurred.

For Appellant: Mr. K. Muggluston, of Umtata.

For Respondent: Mr. F. G. Airey, of Umtata.

SOUTHERN NATIVE APPEAL COURT.

DLONGWANA *v.* NTLOKOMBINI AND ANOTHER.

N.A.C. CASE No. 62 OF 1960.

KING WILLIAM'S TOWN: 27th February, 1961. Before Balk, President; Yates and Gold, Members of the Court.

NATIVE CUSTOM.

Damages for seduction and pregnancy; ntlonze *custom of payment of beast distinguished from custom sanctioning payment of beast to await birth of child.*

Summary: In an action for damages for seduction and pregnancy defendants in their plea and evidence denied the alleged seduction and pregnancy but admitted that a beast had been paid by them to the plaintiff stating that this beast had been handed to the plaintiff's messengers as *ntlonze* with the request that the matter remain in abeyance pending the birth of the child.

Held: Payment of an *ntlonze* beast following a claim for damages for seduction and pregnancy is an admission that the whole of the damages both for the seduction and pregnancy are owing.

Held further: That the other custom sanctioning the payment of a beast by the alleged *tort feasor* or his people is where he admits seduction but denies paternity, and has as its object to defer action on the disputed issue until the birth of the child so that the test of its resemblance to the alleged *tort feasor* can be resorted to by him and his people in determining their final attitude in the matter.

Cases refered to:

Ntloko *v.* Tseku 3 N.A.C. 257, at page 258.

Seymour's Native Law in South Africa (Second Edition), at page 233.

Appeal from the judgment of Assistant Native Commissioner at Lady Frere.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance, with costs, in an action in which the plaintiff (present appellant) claimed from the two defendants (now respondents) four head of cattle or their value, £40, in respect of the balance of the damages due for the seduction and pregnancy of his daughter, Nongendi, averring that one beast, valued at £10, had already been paid by the second defendant on behalf of the first defendant on account of these damages. The first defendant was sued as *tort feasor* and the second defendant as being liable in his capacity as the first defendant's kraalhead.

In their plea the defendants denied the allaged seduction, pregnancy and payment of the beast on account of the damages and alleged that it had been handed to the plaintiff's messengers as *ntlonze* with the request that the matter remain in abeyance pending the first defendant's return and the birth of the child.

The second defendant counterclaimed for the beast referred to above but, owing to an oversight, the Assistant Native Commissioner did not give judgment thereon and the appeal does not cover this aspect. That being so and as the attorneys who represented the parties in this Court made no request that this omission be remedied the matter calls for no further consideration.

The appeal is brought on the following grounds:—

"1. That the judgment is bad in law and against the weight of evidence and is not supported thereby.

2. That on the evidence the Court should have held that plaintiff had proved his claim on a balance of probabilities and should have entered judgment for plaintiff as prayed with costs."

In coming to the conclusion that there was no justification for preferring Nongendi's evidence for the plaintiff that the first defendant had seduced and rendered her pregnant to that of the first defendant to the contrary, the Assistant Native Commissioner relied on two factors, viz,,

(1) that he was unable to determine on the evidence whether the truth lies with the plaintiff's witnesses or with the second defendant insofar as the payment of the beast was concerned; and

(2) the discrepancies between Nongendi's testimony and that of the plaintiff's witness, Nomanditini, anent the events at Dlwengu's and Mzangwa's kraals bearing on Nongendi's allegation that the first defendant there had full intercourse with her which resulted in her pregnancy.

As regards the first factor, the only reason given by the Assistant Native Commissioner for not preferring the preponderance of evidence adduced by the plaintiff as regards the purpose of the payment of the beast to that of the second defendant in this respect is that the plaintiff admitted in cross-examination that he had heard from his men that the second defendant had offered *ntlonze* and had asked that the birth of Nongendi's child be awaited. But, on a proper construction of the plaintiff's evidence, his admission went no further than that his men had told him that the second defendant had offered *ntlonze;* for it seems clear that the plaintiff in replying "I heard that from my men" to the question "Did (defendant) No. 2 at any time offer an *ntlonze* beast asking that the birth be awaited?", had only the first part of the question in mind, i.e. the part dealing with whether or not the *ntlonze* beast had been offered as he went on to explain that he had been told that the second defendant had said he was paying the *ntlonze,* according to custom, as an admission and not merely to await the birth of the child. In any event the custom is as stated by the plaintiff, viz., that the payment of *ntlonze* beast following a claim for damages of the nature here in question is an acknowledgment that the whole of the damages i.e., the damages both for the seduction and pregnancy, are owing, see Ntiloko *v.* Tseku 3 N.A.C. 257, at page 258. Admittedly, there is also the custom sanctioning the payment of a beast by the alleged *tort feasor* or his people, where he admits seduction but denies paternity, the object of the payment being to defer action on the disputed issue until the birth of the child so that the test of its resemblance to the alleged *tort feasor* can be resorted to by him and his people in deciding their final attitude in the matter, see *Seymour's Native Law in South Africa* (Second Edition) at page 233 and the authority there cited viz., Tata *v.* Ntlukaniso 2 N.A.C. 45. This custom, however, affords no assistance to the defendants as their case is, according to their plea and evidence, based on the denial by the first defendant both of the alleged seduction and pregnancy.

It follows that the version of the plaintiff's witnesses that the beast was paid by the second defendant as *ntlonze* and, therefore, as an acknowledgement that the full damages of five head of cattle was owing is the more probable as it is in keeping with custom. The view that the probabilities here favour the plaintiff is strengthened by the second defendant's false denial before the Headman and at the Bantu Affairs Commissioner's office that he had paid the beast to the plaintiff. It is true that the second defendant explained that he had made the false denial because the Board Member had advised him to do so as the beast had been introduced illegally. But, as stressed by Mr. Barnes in his argument on behalf of the appellant, this explanation is clearly untenable in the light of the second defendant's reply in cross-examination that it did not occur to him to admit at the Bantu Affairs Commissioner's office that he had paid the beast when the Board Member stated there that he had made this payment. In any event it is most unlikely that the second defendant would have paid the beast if he had not been satisfied of the first defendant's guilt particularly as the second defendant admitted in his evidence that the first defendant was present when he agreed to pay the beast.

Turning to the second factor relied upon by the Assistant Native Commissioner viz., the discrepancies between the evidence of Nongendi and Nomanditini, these are of little significance firstly, because, as pointed out by Mr. Barnes, it was not put to Nongendi in cross-examination that the first defendant had not been present at the *jaka* at Mzangwa's kraal, this information first coming to light when Nomanditini, who gave evidence after Nongendi, replied to the Court; and, secondly, because the evidence of the Board Member clearly indicates that Nongendi's

evidence is to be preferred to that of Nomanditini in that before him Nomanditini supported Nongendi that the latter and the first defendant had been together both at Dlwengu's and Mzangwa's kraals; and the Board Member appears to be an impartial witness as not only was his credibility not called into question by the Assistant Native Commissioner or attacked on appeal but he did not hesitate to disclose an aspect which favoured the defendants viz., that the first defendatn's admission of intimacy went no further than that he had been under the same blanket with Nongendi but did nothing to her.

Although the admission was qualified, it nevertheless serves to corroborate Nongendi's version that the first defendant seduced and rendered her pregnant as it is inconceivable that he should have been under one blanket with her and have done nothing. That this is so gains support from the fact that, according to the evidence for the plaintiff, including that of the Board Member, the second defendant said when the first defendant had made the admission that he had been wasting his (second defendant's) time and thereupon paid the beast.

It follows that the probabilities favour the plaintiff's case and that the Assistant Native Commissioner was wrong in not finding for him.

The appeal should, accordingly, be allowed, with costs and the judgment of the Native Commissioner's Court on the claim in convention altered to read "For plaintiff as prayed, with costs".

Yates and Gold, Members, concurred.

For Appellant: Mr. B. Barnes, of King William's Town.

For Respondent: Mr. H. J. C. Kelly, of Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

NOMBONA *v.* MZILENI AND ANO.

N.A.C. CASE No. 64 OF 1960.

KING WILLIAM'S TOWN: 28th February, 1961. Before Balk, President; Yates and Gold, Members of the Court.

PRACTICE AND PROCEDURE.

Application for absolution from the instance at close of plaintiff's case in action for damages for seduction and pregnancy—Corroboration of woman's testimony as matter of law not relevant at that stage—Procedure at trial of action in Chief's Court distinguished from procedure at hearing of appeal in Native Commissioner's Court.

Summary: Plaintiff (present appellant) succesfully sued defendants (now respondents) in a Chief's Court for damages for seduction and pregnancy of his daughter, Nosisa. On appeal to the Native Commissioner's Court the Chief's judgment was altered to one of absolution from the instance, with costs, on application by the defendants' attorney at the close of the plaintiff's case and without the defendants having led evidence or closed their case.

In his reasons for judgment the Native Commissioner stated that it was apparent that the Chief's Court erred in accepting the uncorroborated evidence of Nosisa and in relying on the resemblance of the child to the first defendant.

Held: That the question of the legal requirement of corroboration in the Native Commissioner's Court of Nosisa's evidence of her seduction by the first defendant is not relevant at the present stage seeing there is no evidence by the first defendant denying the alleged seduction.

Held further: That the Native Commissioner's criticism of the procedure in the Chief's Court lost sight of the fact that in this respect the Chief followed the customs of his tribe which differ from the common law, and that such procedure is sanctioned by section 1 of the Regulations for Chiefs' and Headmens' Civil Courts.

Held further: That the procedure in the Chief's Court did not affect the decision of the appeal as, in terms of section 12 (5) of the Native Administration Act, 1927 read with section 12 of the Regulations for Chiefs' and Headmens' Civil Courts, the appeal fell to be determined by the Native Commissioner on the pleadings as finalised in his Court and on the evidence there adduced as if the case were one of first instance, the common law rules of evidence being then applicable.

Cases referred to:

Myburgh *v.* Kelly, 1942, E.D.L.D. 202, at page 206/7.

Gafoor *v.* Unie Versekeringsadviseurs (Edms.) Bpk. 1961 (1) S.A. 335 (A.D.), at page 340.

Sgarta and Another *v.* Mbane, 1956, N.A.C. 48 (S), at page 51.

Appeal from the judgment of the Native Commissioner at Middledrift.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court altering, on appeal by the two defendants (now respondents), the judgment of a Chief's Civil Court for plaintiff (present appellant) for five head of cattle or their value, £50. to one of absolution from the instance, with costs, in an action in which the plaintiff claimed the *quantum* awarded by the Chief's Court as damages for the seduction and pregnancy of his daughter, Nosisa, by the first defendant, the second defendant being sued in his capacity as the first defendant's kraalhead.

The appeal to this Court is brought on the ground, *inter alia*, that the Native Commissioner was wrong in decreeing absolution as the plaintiff had made out a *prima* facie case.

As the judgment of the Chief's Court was altered to one of absolution at the instance of the defendant's attorney at the close of the plaintiff's case in the Native Commissioner's Court without the defendants having led evidence or closed their case, the test to be applied here is whether there is evidence on which a reasonable man could or might find for the plaintiff and not whether he should or ought to do so or in other words whether the plaintiff had made out a *prima facie* case, see Myburgh *v.* Kelly, 1942, E.D.L.D. 202, at pages 206 and 207, and Gafoor *v.* Unie Versekeringsadviseurs (Edms.) Bpk. 1961 (1) S.A. 335 (A.D.), at page 340.

Here it must be pointed out that the Native Commissioner should have stated specifically in his judgment that the appeal was allowed, with costs, as appears to have been his intention, and then have added that the judgment of the Chief's Court was altered to one of absolution from the instance, with costs.

The Native Commissioner states in his reasons for judgment that it was apparent that the Chief's Court erred in accepting the uncorroborated evidence of Nosina and in relying on the resemblance of the child to the first defendant. But this

criticism loses sight of the fact that in these respects the Chief followed the customs of his tribe which differ from the common law and that this procedure is sanctioned by section 1 of the Regulations for Chiefs' and Headmen's Civil Courts. This aspect is, however, of no moment as, in terms of section 12 (5) of the Native Administration Act, 1927, read with section 12 of the said Regulations, the appeal fell to be determined by the Native Commissioner on the pleadings as finalised in his Court and on the evidence there adduced as if the case were one of first instance, the common law rules of evidence being then applicable.

The question of the legal requirements of corroboration in the Native Commissioner's Court of Nosisa's evidence of her seduction by the first defendant is of no consequence at this stage seeing there is no evidence by the first defendant denying the alleged seduciton, see Sgarta and Another, *v.* Mbane, 1956, N.A.C. 48 (S), at page 51, and the authorities there cited.

In finding that the plaintiff did not make out a *prima facie* case, the Native Commissioner relied on the discrepancies between the evidence of the plaintiff's witnesses, Nosisa and Dudu, and on their evasiveness in answering questions. These discrepancies consist of the denial by Dudu of Nosisa's statement that there had been correspondence between him and her mother anent his returning from work to give evidence in this case and that he had brought her a verbal message from the first defendant to meet the latter.

Whilst there are probabilities both for and against the view that Nosisa's evidence in these respects may be at fault, there can be no certainty in regard to this aspect. That being so and as, according to Nosisa's evidence, the first defendant seduced and rendered her pregnant, a reasonable man might find for the plaintiff on the evidence adduced by him notwithstanding the abovementioned discrepancies and the evasiveness of his witnesses, see Myburgh's case at the pages indicated above. It follows that the plaintiff did make out a *prima facie* case and that the Native Commissioner should accordingly have refused the application for absolution from the instance.

The appeal should, therefore, be allowed, with costs, and the judgment of the Native Commissioner's Court altered to one refusing the application for absolution from the instance and the case should be remitted to that Court for trial to a conclusion.

Yates and Gold, (Members) concurred.

For Appellant: Mr. G. R. E. Gillitt, of King William's Town.

For Respondents: Mr. D. Alison, of King William's Town.

SOUTHERN NATIVE DIVORCE COURT.

MAHASE vs. **MAHASE AND KOZA.**

N.A.C. CASE No. 549 OF 1960.

CAPE TOWN: 21st April, 1961. Before Balk, President.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Divorce Courts to hear actions for damages against co-respondents.

The President in dealing with the question whether this Court had jurisdiction in the claim for damages for adultery against the co-respondent in this case, came to the conclusion that the answer was in the negative as it was clear from the language of the statutary provisions creating this Court, namely, Section 10 (1) of the Native Administration Act, 1927, Amendment Act, No. 9 of 1929, as amended, that its jurisdiction is limited to the three types of matrimonial causes specified therein i.e. any suit of nullity, divorce or separation, and to any question arising from the marriage in such a suit so that the action for damages against the co-respondent being, as it is, a separate delictual action and not therefore being able to be regarded as part and parcel of the divorce action or as a matter arising from the marriage, is not cognisable by this Court consonant with its previous decisions to this effect.

For Plaintiff: Adv. W. J. Vos.

For Defendants: In person.

SOUTHERN NATIVE APPEAL COURT.

DAWEDI vs. **BUWA.**

N.A.C. CASE No. 63 OF 1960.

UMTATA: 8th June, 1961. Before Balk, President; Yates and Johnson, Members of the Court.

PRACTICE AND PROCEDURE.

Evidence—standard of proof in civil matters.

During the course of his judgment in an interpleader action brought on appeal to this Court from the Court of a Native Commissioner, the President commented as follows:—

"The Acting Native Commissioner states in his reasons for judgment that the versions of both sides could reasonably have been true and that it was not possible to ignore or completely discard either of these versions. He went on to say that no conclusive proof was forthcoming that the cattle in fact belonged to the claimant and not to the judgment debtor and that the Court found itself unable to say beyond a reasonable doubt that the claimant was the real owner of the cattle so it declared them executable.

In holding that the claimant had to prove his case beyond a reasonable doubt the Native Commissioner relied on a dictum to this effect in *Simanga vs. Nkampule* 1 N.A.C. (S.D.) 75, at page 76. But that dictum must be taken to have been been overruled in the light of the judgment in *Gecelo vs. Geleco* 1957 N.A.C. 161 (S) at page 163 and the authorities there cited, from which it is manifest that the basis of decision in all civil matters is a preponderance of probability with due regard to the onus of proof and that no more than this is meant by conclusive proof. The higher standard of proof beyond a reasonable doubt is that peculiar to criminal cases.

It remains for this Court to consider whether the claimant established his case on the proper basis i.e. on a preponderance of probability."

Cases referred to:

Simanga vs. Nkampule 1 N.A.C. (S.D.) 75, at page 76.
Gecelo vs. Geleco 1957 N.A.C. 161 (S), at page 163.
Yates and Johnson, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.
For Respondent: Mr. K. Muggleston of Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

SIBIYA *v.* **MNGUNI.**

N.A.C. CASE No. 96 OF 1960.

ESHOWE: 18th April, 1961, Before Ramsay, President; King and Cornell, Members of the Court.

NATIVE CUSTOM.

Claim by wife for dissolution of customary union on account of desertion by husband—counterclaim for desertion by husband, joining natural guardian who is not her father, the father's heir being a minor.

Summary: Plaintiff, a married woman, sued her husband for dissolution of the customary union on the grounds of desertion and for custody of a child. Her husband counterclaimed for the return of his wife or dissolution of the union, joining the wife's guardian or protector as Second Defendant, from whom he claimed return of his *lobola.* The heir to the wife's father is a minor and was not cited.

Held: That an order for return of the *lobola* could not be made against the wife's guardian, he being fortuitously and temporarily the woman's guardian. The present *lobola* holder is the wife's father's minor son and heir and he should have been joined duly assisted, as Second Defendant in recovention.

Appeal from the Court of Native Commissioner, Mtunzini.
Ramsay (President):

The application for condonation of the late noting of appeal is granted.

Plaintiff, a married woman, sued her husband for dissolution of the customary union on the ground of malicious desertion, custody of one child and costs. Defendant pleaded denial of desertion. Defendant then gave notice of application to join one Dinisi Sibiya as Second Defendant in a claim in reconvention for desertion by the Plaintiff. Dinisi Sibiya had been mentioned in Plaintiff's summons as assisting her, but his relationship to her was not disclosed. The claim in reconvention claimed dissolution of the union, custody of the child and the refund of 11 head of *lobola* with costs. Defendant asserted that Dinisi Sibiya was general heir to plaintiff's deceased father. Defendant's plea denied desertion and Plaintiff's plea did likewise, queried the number of cattle paid as *lobola* and denied that Dinisi Sibiya was the general heir of Plaintiff's late father. There was no plea by the Second Defendant in recovention, although the application to join him was granted.

On the day of the trial Dinisi Sibiya was absent, and at the close of Defendant's case application was made, and granted, that Dinisi be considered as cited in his capacity as guardian of Plaintiff and not in his personal capacity.

This was then the position at the trial—Dinisi Sibiya, stated to be assisted Plaintiff to give her *locus standi,* was absent and so not in a position to assist her. An application to join him as a Defendant in a claim in reconvention was granted in his absence as he was absent but represented. At the close of Defendant's case, application was made by Plaintiff's attorney for a postponement to call Dinisi Sibiya and this was granted. On the due date, not only was this witness called, but also a further witness for Defendant, although he had already closed his case. There is no word of explanation of this extraordinary procedure.

The Native Commissioner gave judgment for "(1) the dissolution of the union, (2) custody of the child awarded to Plaintiff, (3) Plaintiff to return to the kraal of her brother Dinisi Sibiya, (4) six head of cattle to be returned to Defendant, (5) there will be no order as to costs". The judgment does not state who has to return six head of cattle to Defendant and in whose favour the judgment is.

Appeal is noted against that portion of the judgment which awards six cattle to Plaintiff and is lodged by Second Defendant in reconvention. The grounds are that the order was not competent as the Second defendant in reconvention is not the heir to his late father, and that no order was made joining Second Defendant in reconvention as a party in the action, hence no order was competent against him. The second ground ignores the note at the top of page 10 of the copy of the record where it is recorded that the application that Dinisi Sibiya be joined as Second Defendant (obviously in reconvention) was granted.

In regard to the first ground of appeal, it is well taken. It would be manifestly unjust to mulct Dinisi Sibiya of six head of cattle merely because he is fortuitously and temporarily the guardian of Plaintiff during the minority of the heir Falake, whose existence is not challenged. It would appear that the proper person to have joined as co-defendant in the claim in reconvention was Falake, assisted by Dinisi Sibiya.

The appeal is allowed and item (4) of the judgment of the Lower Court, viz. "six head of cattle are to be returned to Defendant" is deleted. There will be no order as to costs of this appeal to express this Court's disapproval of the whole manner in which this case has been conducted.

King and Cornell, Members, concur.

For Appellant: Mr. F. P. Behrmann, instructed by H. H. Kent & J. G. Barnes.

For Respondent: Mr. D. A. C. Haines, instructed by D.A. C. Haines & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

SITHOLE vs. **CEBEKHULU AND OTHERS.**

N.A.C. CASE No. 108 OF 1960.

ESHOWE: 22nd April, 1961, before Ramsay, President; King and Crossman, Members of Court.

CONFLICT OF LAWS.

Inherent powers of chief to eject person from his location—statutory provisions to effect same purpose.

Summary: On instructions from a Chief's Council the Defendants destroyed Plaintiff's hut for the alleged reason that he was an unauthorised and undesirable resident of the location. Certain property was lost during or after this operation.

Held: That any original inherent powers possessed by a Chief to eject a person from his location have been superseded by Government Notice No. 123 of 1931.

Legislation referred to:

Government Notice No. 123 of 1931, Sections 3 (2), 21, 22; Act No. 38 of 1927, Section 2 (9).

Appeal from the Court of the Native Commissioner, Empangeni. *Ramsay* (President):

Plaintiff, a Native in the ward of Chief Kapati Cebekhulu, sued the Chief and 15 others of his followers for £141 damages on the allegation that the followers acting on instructions of the Chief, unlawfully destroyed Plaintiff's dwelling and removed certain property therefrom. The summons was amended to indicate that instead of the property of Plaintiff being removed, it was left unguarded by Defendants and removed by some person or person unknown.

The Defendants pleaded that the hut was destroyed as alleged but that it was done by them in their capacity as members of the tribal council on instructions from Defendant No. 1. They deny that the act was unlawful and that they removed any of Plaintiff's property.

The Native Commissioner gave judgment in favour of the Defendants and Plaintiff now appeals on the folowing grounds:—

1. The Native Commissioner erred in law in holding that the First Defendant had authority to remove or to instruct his followers to remove Plaintiff or his kraal from the Reserve.
2. The Native Commissioner erred in Law in fact in his finding that the hut was movable structure and of no value.
3. The Native Commissioner erred in Law in finding that Plaintiff had fabricated his evidence as to the value of the lost articles.
4. The Native Commissioner erred in finding that Plaintiff committed gross contempt of the Chief's Court and jurisdiction.
5. No or insufficient regard was had to the fact that First Defendant gave as his reason for instructing that the hut should be demolished was that Plaintiff had been guilty of contempt of Court, and the Native Commissioner ought to have found that First Defendant acted *mala fide* in so instructing.

6. Having regard to the provisions of Proclamation No. 123 of 1931 (as amended), even if it be found that first Defendant had authority to eject plaintiff, the Native Commissioner ought to have found that Plaintiff ought to have been given notice of First Defendant's intention so to eject him and in the absence of such notice, ought to have found that the action of Defendants was unlawful.
7. The Native Commissioner erred in finding that there was no proof of negligence by Defendants 2 to 16.
8. The Native Commissioner ought to have found that Defendants 2 to 16 were acting unlawfully in demolishing Plaintiff's hut and therefore owed him a duty to take care of his goods.
9. In view of the provision of Proclamation No. 123 of 1931 (as amended), the Native Commissioner ought to have found that the jurisdiction of First Defendant to eject Plaintiff was ousted.

The Native Commissioner in his reasons for judgment states:

"It is clear that Plaintiff had no legal right to be in the Reserve. Although he was accepted by the Chief and although he was given an allotment, the permission of the Native Commissioner had not been obtained as provided in Section 3 (2) of the Regulations published under Government Notice No. 123 of 1931. Plaintiff was therefore not the holder of an allotment in the said Reserve, an allotment being defined as portion of land in a location lawfully occupied under the provisions of these regulations by a Native for arable or residential purposes. As he was not lawfully in occupation of an allotment he could not be termed an allotment holder and consequently the provisions of Regulation 10 and 11 of the said Regulations did not apply to him.

It is agreed that the Plaintiff could have been dealt with in terms of Regulations 19 and 20 but do these provisions oust the customary authority vested in a Chief to preserve Law and order in his Reserve where a trespasser, which Plaintiff was, flouts both his authority and the jurisdiction of the Court.

Because a Chief is charged by the regulations governing the powers and duties of a Chief to preserve law and order in his Reserve, because the right of grant of residence and ejectment of trespasser is inherent in Native customary law in the Chief, the Court found that the Chief acted within his customary powers and prescribed duties in taking steps to eject the Plaintiff, who had successfully prevented the Chief's constable contacting him. For these reasons and furthermore because the hut was a movable structure and of no value—see *White Makoba vs. Makoba* 1945 N.A.C. (T. & N.), page 29—No liability falls on any of the Defendants for the destruction of the hut."

Sections 21 and 22 of Proclamation No. 123 of 1931 which regulates the occupation of land and the control of locations in Natal reads:—

21. "Any person commits a breach of these regulations—

(1) who, without having been duly authorised thereto either under these regulations or any other law—

(*a*) erects, establishes, occupies or uses any building or homestead on commonage;

(*b*) encloses, ploughs, cultivates or breaks up commonage otherwise than for buying dead bodies or refuse;

(*c*) encamps, takes up his abode or occupies commonage for any purpose whatsoever;

(2) who, contrary to the provisions of these regulations, causes damage to land, whether by neglecting to fill in any excavation or furrow or otherwise when removing improvements in terms of Section 13;

(3) who disregards or fails to comply with any order or finding made under the provisions of sub-section (3) of Section 3.

22. In addition to any other penalty to which he may be liable, the Court may order any person convicted of a breach of Section 21 of these regulations to remove or demolish any hut, building of other obstruction erected, established, occupied or used without authority, or to repair any damage done to commonage within a time prescribed by the Court not less than ten days after completion of the sentence. Should such person fail to comply with such order within the time prescribed he shall be liable—

(*a*) to a further fine not exceeding five shillings in respect of each day of non-compliance after its expiration and in default of payment to additional imprisonment for any period not exceeding three days in respect of each day as aforesaid; and

(*b*) to have the work that the Court has ordered him to do carried out at his expense on order issued by the Native Commissioner."

Irrespective of any original powers inherent in Chiefs, the promulgation of specific regulations to provide for a contingency which might previously have been dealt with by Chiefs under those powers, supersedes those powers. Even a Native Commissioner, who has greater powers than a Chief, can function only in compliance with regulation. In the present instance, the Native Commissioner himself could cause the destruction of the Plaintiff's hut only if the latter failed to comply with an order to remove. If a Native Commissioner's actions are controlled by regulations it cannot be conceived that a Chief, by virtue of inherent authority, can have greater latitude. Section 3 (3) of the regulations provides for Chiefs to exercise certain functions and powers in connection with the occupation of land, with an appeal to the Native Commissioner. In this case the Plaintiff was given no chance to appeal. He was also deprived of the right of being heard in a criminal prosecution for contravening a provision of Section 21 of the Proclamation. He was, in fact, tried and condemned in his absence, and punishment carried. out by his prosecutors who were also his judges. Even if a Chief has an inherent power to eject someone from his area, such ejection would have to be made in accordance with Law.

If Plaintiff insulted the Chief, the latter could have tried him for contempt or instituted a prosecution under the provisions of Section 2 (9) of Act No. 38 of 1927.

In short, the Chief and his *bandla* had no right to take steps outside the Law to rid themselves of the Plaintiff and to rely on his illicit occupation of the tribal land when the Chief of the area had given him permission to reside there. It is true that such permission was legally ineffective without the confirmation of the Native Commissioner, but the Plaintiff cannot be blamed when he had received the Chief's permission to reside.

The appeal must therefore succeed in principle.

In regard to the specific damages for loss of property, the Plaintiff has failed to prove the damages claimed and the probabilities are on the side of the Defendants. If the woman ran away as she states, it was she who abandoned her goods and chattels. It seems most unlikely, if she ran to the kraal of a neighbour that the neighbours family would not turn out to see what was happening. It is improbable that a lone woman

would threaten 15 men with a cane knife. The woman herself states that she was told by the Defendants to remove all the family chattels from the hut. She did not do so. The responsibility of any loss is accordingly hers. Plaintiff's own catalogue of goods missing differs from his claim in the summons. It is, however, clear that the hut was demolished. The Native Commissioner found that the hut had no value and quoted the case of *Makoba vs. Makoba,* 1945, N.A.C. (T. & N.) 29 but that case is distinguished as the circumstances were quite different.

Plaintiff testifies that he expended about £14. 10s. on erecting the hut and he was not cross-examined on the nature and substance of the hut. In the absence of cross-examination the Plaintiff's attorney was not to know that the value of the hut was to be challenged. Further, Defendant's plea does not specifically challenge the value as set forth in the summons.

It is felt that justice will be served if Plaintiff is awarded £14. 10s. damages.

The appeal is allowed with costs and the judgment of the Court below is altered to one for Plaintiff for £14. 10s. damages and costs against the Defendants jointly.

King and Crossman, Members, concur.

For Appellant: Mr. F. P. Behrmann, instructed by H. H. Kent & J. G. Barnes.

For Respondent: Mr. D. A. C. Haines, of D. A. C. Haines & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU vs. MNCUBE.

N.A.C. CASE No. 109 OF 1960.

ESHOWE: 21st April, 1961. Before Ramsay, President; King and Cornell, Members of Court.

NATIVE CUSTOM.

Liability of guardian for torts committed by ward—Section 141 (1) *of Natal Code of Native Law.*

Summary: Plaintiff sued Defendants, alleging that First Defendant had assaulted him and that Second Defendant as father and guardian, was also liable.

Held: That a guardian was liable for the delicts committed by his ward while in residence at the same kraal as himself irrespective of the ward's age or marital status.

Case referred to:

Luponjwana Mahayi vs. Giyana Mhlongo and Johan Mhlongo, 1942, N.A.C. (T. & N.) 59.

Legislation referred to: Natal Code of Native Law 1932, Sections 141 (1), 141 (2), 27 (1).

Appeal from Court of Native commissioner, Nongoma.
King (Permanent Member):

In this case the Plaintiff sued the Defendants for the sum of £65-15-6 and costs alleging that the First Defendant had wrongfully assaulted him and that Second Defendant, as father and guardian was also liable.

Defendant No. 1 admitted the assault but pleaded that it was under extreme provocation. Defendant No. 2 admitted that he was the father and guardian of No. 1 but pleaded that as No. 1 was now a major he, (No. 2), was not responsible for No. 1's wrongful deeds.

The Native Commissioner gave judgment for the Plaintiff as prayed and the Second Defendant appealed on the ground:

> "That the judgment is against the weight of evidence and bad in law as against defendant No. 2".

The notice of appeal indicated that further ground of appeal would be filed as soon as the copy of the record was received. No further grounds of appeal have been filed.

At the hearing of the appeal counsel for appellant relied solely upon his contention that Defendant No. 2 had not been sued in his capacity as kraalhead but in his capacity as "father and guardian" and, basing his argument on Section 141 (1) of the Code, stated that a guardian was only liable for the acts of his ward and that this implied that the ward was a minor. He referred to the plea which alleged that the First Defendant was a major and submitted, therefore, that Defendant No. 2 was in no wise responsible to the Plaintiff.

Section 141 (1) relied upon reads as follows:—

> 141 (1) A guardian is liable in respect of delicts committed by his ward while in residence at the same kraal as himself.

Counsel, however, did not read far enough and should also have read Section 141 (2), Section 141 (2) (*a*) and Section 27 (1) which reads as follows:—

> 141 (2) Notwithstanding anything in Section 27 or in any other provision of this Code;
>
> (*a*) a father is liable in respect of delicts committed by his children while in residence at the same kraal as himself.
>
> 27 (1) A Native male becomes a major in law on marriage or upon entering into a customary union, or on attaining the age of twenty-one years . . . ."

Clearly, therefore, as father of the *tort feasor*, his liability for the *torts* of his son is not affected by the latter's age.

If any additional support for the above contention is desired it is to be found in the judgment in the case of *Luponjwana Mahayi vs. Giyana Mhlongo and Johan Mhlongo*, 1942, N.A.C. (T. & N.) 59, where the father was held to be liable for the *torts* even of his married son.

The appeal is dismissed with costs.

Ramsay, President, and Cornell, Members concur.

For Appellant: Mr. W. E. White instructed by H. L. Myburgh.

For Respondent: Mr. H. H. Kent.

SOUTHERN NATIVE APPEAL COURT.

GENGE vs. **FUNANI.**

N.A.C. CASE No. 2 OF 1961.

UMTATA: 1st and 9th June, 1961. Before Balk, President; Yates and Blakeway, Members of the Court.

PONDO CUSTOM.

Kraalhead liability of guardian for torts *of minor where latter lives at own separate kraal.*

Summary: The Plaintiff sued the two Defendants jointly and severally in a Native Commissioner's Court for damages for the seduction and pregnancy of his daughter, citing the First Defendant as the *tort feasor* and the Second Defendant as being liable in his capacity as being the First Defendant's guardian and kraalhead. The First Defendant consented to judgment but the Second Defendant (present Appellant) contested the action denying in his plea that he was liable for the *torts* of the First Defendant in that the latter was not an inmate of his kraal.

The undisputed facts are that the Second Defendant is a half-brother of the First Defendant, the latter's mother having married the Defendant's father after the death of his first wife who was the Second Defendant's mother. The Second Defendant is married and the First Defendant unmarried. They had resided in their own seperate kraals since prior to the commission of the *tort*. The Second Defendant is the nearest male relative of the First Defendant.

Assessors were consulted on points of custom involved.

Held: That under Pondo custom the Second Defendant is the kraalhead of the First Defendant but that the former was not in the circumstances of this case personally liable for the latter's *torts*.

Appeal from the judgment of the Acting Native Commissioner, Ngqeleni.

Balk (President):

The Plaintiff sued the two Defendants, jointly and severally, in a Native Commissioner's Court for five head of cattle or their value, £50, as damages for the seduction and pregnancy of his daughter Eunice, citing the First Defendant as the *tort feasor* and the Second Defendant as being liable in his capacity as the First Defendant's guardian and kraalhead.

The First Defendant consented to judgment which was entered against him accordingly but the Second Defendant (present Appellant) contested the action denying in his plea that he was liable for the First Defendant's *torts* in that the latter was not an inmate of his kraal. The Second Defendant also denied in his plea that he was the First Defendant's Guardian averring that the First Defendant was a major.

At the conclusion of the trial the Acting Native Commissioner gave judgment for the plaintiff as prayed, with costs, against the Second Defendant. The appeal from that judgment is brought on the following grounds: —

" 1. That the judgement is against the weight of the evidence, the facts found proved and the probabilities of the case.

2. The judgment is bad in Native Law and Custom in that kraalheadship liability only attaches a kraalhead (*sic*) at whose kraal the *tort feasor* actually resides and is an inmate of and is not based on legal guardianship and control of the affairs of the kraal at which the *tort feasor* resides if it is not the same as the one at which the kraalhead also resides."

The undisputed facts are that the Second Defendant is a half-brother of the First Defendant, the latter's mother having been married by the Defendant's father after the death of his first wife who was the Second Defendant's mother. The Second Defendant is married and the First Defendant unmarried. They have resided in seperate kraals since prior to the commission of the *tort* by the First Defendant. The Second Defendant is the nearest major male relative of the First Defendant, their father and the Second Defendant's elder brother having died and the latter's sons being minors.

It is not clear from the evidence whether the First Defendant was a major or a minor according to common law when he committed the *tort*. This aspect, however, calls for no further consideration as it is manifest from the Native Commissioner's reasons for judgment that he applied Native law in deciding the case and the correctness of his having done so is not in question.

The Native Commissioner based his judgment against the Second Defendant on his finding that the latter was the First Defendant's kraalhead and in arriving at that finding he relied on the evidence of the First Defendant and his mother for the Plaintiff that the Second Defendant has exercised control over the livestock at their kraal and that the First Defendant had given his earnings to the Second Defendant. Their evidence is to the effect that the Second Defendant administered their affairs and was given the First Defendant's earnings in his capacity as the First Defendant's guardian. Here it should be mentioned that the Second Defendant's denial in his evidence that he was the First Defendant's guardian carries no weight as the Second Defendant admitted in his evidence that the First Defendant was a minor according to Native law and he did not dispute that he was the First Defendant's nearest major male relative. The Second Defendant's liability is, however, not contingent upon the guardianship but on kraalhead responsibilty, see *Motseoa vs. Qungane* 1 N.A.C. (S.D.) 16, at page 17 and *Mhlokonyelwa vs. Ngoma* 1 N.A.C. (S.D.) 197.

The question whether the guardian is in Native law regarded as his ward's kraalhead and as such personally liable for a *tort* committed by the ward notwithstanding that they reside in separate kraals at the time, was put to the Pondo assessors whose replies are appended. It will be observed therefrom that they are all of the opinion that although the guardian in such a case is the ward's kraalhead, he is not personally liable for his ward's *torts*. I am in agreement with this view as the liability of a kraalhead for the *torts* of an inmate stems from his obligation to exercise control over them in his capacity as kraalhead, see *Motseoa's* and *Mhlokonyelwa's* cases (*supra*) and the fact that a kraalhead can oblige an inmate to set up a separate establishment and so avoid liability for his *torts*, see *Fono vs. Tomose* 1930 N.A.C. (C. & O.) 48, at page 49, is a clear indication that the control envisaged is that of a kraalhead over an inmate of his own kraal i.e. a kraal belonging to him, and does not extend to the control exercised by a guardian over his ward where, as here, the ward has his own separate kraal.

The appeal should accordingly be allowed, with costs, and the judgment of the Native Commissioner's Court against the Second Defendant altered to one for him, with costs.

OPINION OF PONDO ASSESSORS.

Assessors in Attendance.

1. Mdabuka Mqikela from Lusikisiki District.
2. Madlanya Tantsi from Tabankulu District.
3. Nonqonwana Jiyajiya from Libode District.
4. Barnabas Siroqo from Libode District.
5. Tolikana Mangala from Libode District.
6. Mapiki Gwadiso from Ngqeleni District.
7. Gibisela Bokleni from Ngqeleni District.

Question by President:

Where a minor and his widowed mother are living alone at a kraal established for her by the guardian but separate from the latter's kraal, is the guardian the kraalhead of the kraal where the minor lives?

Reply by Tolikana Mangala:

Yes.

All the other assessors agree.

Question by President:

Is the guardian liable with his own stock in his capacity as the kraalhead of the kraal at which the minor lives for the minor's *torts*.?

Reply by Tolikana Mangala.

The cattle attachable for the minor's *torts* are those at the minor's kraal which belong to the minor and his mother. The guardian is not liable with his own cattle for the minor's *torts*.

All the other assessors agree.

Question by Mr. Airey:

If the minor and his mother have no stock what is the position?

Reply by Nonqonwana Jiyajiya:

If there are no cattle at the kraal of the minor, the claim must wait until the minor has cattle. The guardian is still not liable for the minor's torts.

All the other assessors agree.

Yates and Blakeway, members, concur.

For Appellant: Mr. R. Knopf of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

GODLIMPI vs. **NCOBELA.**

N.A.C. CASE No. 3 OF 1961.

UMTATA: 8th June, 1961. Before Balk, President; Yates and Johnson, Members of the Court.

DAMAGES.

General damages for physical assault—quantum *not affected by verbal provocation.*

PRACTICE AND PROCEDURE.

Evidence—Court cannot take cognisance of evidence in record *of criminal case merely because record put in by consent.*

Summary: In an action in a Native Commissioner's Court for damages for physical assault it was common cause that the Defendant (now Appellant) injured the Plaintiff (present Respondent) by striking him on the head with a hunting stick.

The appeal to this Court was brought on grounds which resolve themselves to this, that the Native Commissioner's judgment was against the weight of the evidence particularly as regards the events leading up to the alleged assault and as regards the amount of damages and that in any event the damages awarded were excessive.

This Court found that the assault had been provoked by no more than a verbal insult.

From the Native Commissioner's reasons for judgment it was clear that in rejecting the defence version he relied, *inter alia*, upon the evidence given in the criminal case relating to the assault, the record of which had been put in by consent.

Held: That the *quantum* of damages for pain and suffering, loss of amenities and incapacity, awarded for physical assault is not affected by verbal provocation.

Held further: That it was not competent for the Native Commissioner to rely on the evidence given in the criminal case relating to the assault, the record of which was handed in by consent, in the absence of an agreement between the parties either express or implied that the evidence in the criminal case was to form evidence in the case under trial.

Cases referred to:

Radebe vs. Hough, 1949 (1) S.A. 380 (A.D.), at page 385.

Appeal from the judgment of the Assistant Native Commissioner, Umzimkulu.

Balk (President):

The Plaintiff (now Respondent) sued the Defendant (present Appellant) in a Native Commissioner's Court for £3. 10s. special damages and £196. 10s. general damages for an unprovoked assault on him with a loaded stick which caused a depressed fracture of his skull.

The special damages were claimed for medical charges and the cost of transport and the general damages for pain and suffering, loss of amenities and incapacity resulting from the weakening of the Plaintiff's right arm and leg.

In his plea the Defendant denied the alleged assault as well as that the Plaintiff had suffered damages and went on to state that if it was proved that he had assaulted the Plaintiff, the assault was justified as the Plaintiff had provoked him by publicly insulting him, poking him in the face with a stick and threatening to assault him.

At the conclusion of the hearing, the Assistant Native Commissioner entered judgment for Plaintiff for £3. 10s. special damages and £150 general damages for pain and suffering, loss of amenities and incapacity, with costs.

The appeal from that judgment is brought on grounds which resolve themselves to this that the judgment is against the weight of the evidence particularly as regards the events leading up to the alleged assault and as regards the amount of the damages and that in any event the damages awarded were excessive.

It is common cause that the Defendant injured the Plaintiff by striking him on the head with a hunting stick and it is not disputed that this injury consisted of a depressed fracture of the skull.

The Plaintiff's case, according to his evidence, is briefly that the Defendant ordered him and other men attending a beer drink at the Defendant's kraal to leave the hut for no apparent reason and that as he was coming out of this hut the Defendant, without provocation, felled him with a blow on the head with a hunting stick, i.e. with a knobstick.

The Defendant's version is that he ordered certain two men whom he had good reason for not wanting at his kraal to leave a hut there. They did so. He then went into the hut and found the Plaintiff and another there. He asked the Plaintiff why he had remained when the others had left. The Plaintiff replied "I don't speak to things like this", picked up his sticks and went out of the hut. He followed the Plaintiff and outside the hut the Plaintiff poked him in the face with a stick and delivered two blows at him which he warded off. He then struck the Plaintiff with a hunting stick, felling him.

Isaac Dhlamini's evidence for the Plaintiff that he had not seen the Plaintiff doing anything to the Defendant and had not heard the Defendant speak to the Plaintiff carries little weight as it is manifest that he did not see the Defendant strike the blow which felled the Plaintiff and that he was some distance from the hut at the time, and, as pointed out by Mr. Muggleston in his argument for the Appellant, Dhlamini's testimony that he saw the Defendant striking the Plaintiff whilst the latter lay on the ground is irrelevant as it is clear both from the particulars of claim and the Plaintiff's evidence that his case is founded solely on the blow on his head which felled him.

The Defendant's wife in her evidence for him bears out his version that the Plaintiff poked him in the face with a stick and that he warded off the blows delivered by the Plaintiff.

It is apparent from the Assistant Native Commissioner's reasons for judgment that in rejecting the defence version, he relied, *inter alia*, upon the evidence given in the criminal case relating to the assault, the record of which had been put in by consent. It was not competent for him to do so, however, in the absence of an agreement between the parties, either expressed or implied, that the evidence in the criminal case was to form evidence in the case under trial, the mere handing in of the record of the criminal case by consent not implying such agreement, particularly where, as here, the object of handing in the record may have been to

prove that the Defendant had pleaded guilty to the charge of assaulting the Plaintiff, see *Fourie vs. Morley and Co.,* 1947 (2) S.A. 218 (N.P.D.), at pages 222 and 223 and the authorities there cited.

The discrepency between the Defendant's evidence and that of his wife anent their movements at the time immediately proceding the assault on the Plaintiff, also relied upon by the Native Commissioncr, strikes me as being more apparent than real if viewed in its proper perspective. The remaining reasons given by the Native Commissioner for having preferred the Plaintiff's version of the events leading up to the assault on him to that of the defendant also do not appear to be cogent. It is unnecessary, however, to go into this aspect in detail as will be apparent from what follows.

The defence version that the Plaintiff poked the Defendant in the face with his stick and struck twice at him before the latter struck the blow felling the Plaintiff is, as pointed out by Mr. Airey in his argument on behalf of the Respondent, negatived by the Defendant's admission in cross-examination that he hit the Plaintiff because of the latter's insulting reply to him in the hut. i.e. "I don't speak to things like this"; and here is must be borne in mind that, according to the Defendant, he struck the Plaintiff only one blow viz., the one which felled him. As also pointed out by Mr. Airey, a further factor indicating that there is no substance in the defence allegation of an assault by the Plaintiff on the Defendant is the latter's admission in cross-examination that he had not reported the assault to the Police when he was arrested for having struck the Plaintiff on the same day that he had done so.

The position is, however, otherwise as regards the Defendant's allegation that the Plaintiff had made the insulting reply to him in the hut; for it indicates provocation and is, therefore, more probable than the Plaintiff's version that the Defendant should have struck him for no apparent reason.

That there was this provocation does not, however, assist the Defendant, firstly, because the insulting reply by the Plaintiff afforded no justification for the physical assault by the Defendant on him, see *Ntozini vs. Kafula,* 1937 N.A.C. (C. and O.) 212, at page 213 and *Bantjes vs. Rosenberg,* 1957 (2) S.A. 118 (TP.D.), at page 119; and, secondly, in that the provocation here cannot affect the measure of damages for pain and suffering, loss of amenities and disability which form the basis of the claim and the award in the instant case but only that for *contumelia* which are not in question here, see *Quonqa vs. Dyan and Ano.* 1 N.A.C. (S.D.) 352, at page 354 and the authority there cited, viz. *Radebe vs. Hough,* 1949 (1) S.A. 380 (A.D.), at page 385. In this connection it should be mentioned that the case of *Powell vs. Jonker,* 1959 (4) S.A. 443 (T.P.D.), cited by Mr. Muggleston cannot, with respect, be regarded as an authority here on the aspect in question regard being had to the Appellate Division's decision thereanent in *Radebe's* case (*supra*).

That the Plaintiff incurred medical and transport expenses in the sum of £3. 10s., as claimed, as a result of the assault on him by the Defendant is manifest from the Plaintiff's uncontroverted evidence in this respect and was not challenged on appeal.

The only remaining question calling for consideration is whether the general damages awarded are excessive.

The Plaintiff stated in his evidence that he had been in hospital for a month and a half, that he had undergone an operation there and that he had suffered very much pain as a result of

the injury to his head inflicted by the Defendant in the assault on him and still had these pains. In addition this injury caused a weakness to his right arm and leg which caused him to limp as well as an impediment in his speech. The medical evidence indicates that this pain and suffering and disability are consistent with having been caused by the injury in question. It is true that the medical practitioner's evidence rating the Plaintiff's disability at 50 per cent is difficult to reconcile with his testimony that the weakness of the Plaintiff's right arm and leg was very slight. But this aspect is of no moment as the Native Commissioner disregarded the 50 per cent rating in making the award. His reasons for doing so are not clear as he states that he based his award on different factors and that an award based on the 50 per cent rating would represent special damages and there was insufficient evidence to justify such damages. It may be that he had the loss of earnings in mind, the amount of which it is not possible to determine from the evidence. Be that as it may, the Native Commissioner properly rejected the 50 per cent rating as it appears to conflict with the other medical evidence that the disability as regards the arm and leg was very slight and the onus of proof in this respect rested on the Plaintiff on the pleadings. The Defendant's denial in his evidence that the Plaintiff had an impediment in his speech as a result of the assault carries little weight as it is rather too much of a coincidence that the Plaintiff's speech should have been impaired before the assault in a manner consistent with its having been caused thereby, as borne out by the medical evidence.

As pointed out by the Native Commissioner in his reasons for judgment, the Court in *Radebe's* case (*supra*) increased the damages for pain and suffering from £16 to £200 and whilst each case falls to be determined on its particular circumstances, that case is nevertheless instructive here. There the Plaintiff suffered fairly severe pain for ten days whilst in hospital, continued to suffer pain for about three months and thereafter there would be pain at intervals. Here the Plaintiff suffered a great deal of pain and continued to have such pain up to the time of the trial almost six months after the assault. In addition, there is an impediment in his speech and the slight disability in so far as his right arm and leg are concerned which, according to the medical evidence, would persist. In the circumstances and bearing in mind that the value of money has depreciated considerably since the award in *Radebe's* case, I am of the opinion that the £150 awarded by the Native Commissioner for pain and suffering, loss of amenities and incapacity cannot be regarded as excessive. This view also finds support from the judgment in *Albert vs. Engelbrecht,* 1961 (1) P.H., J.11 (T.P.D.) where £512. 10s. was awarded as general damages in respect of an injury and disability closely akin to those in the instant case and involving pain over a lesser period.

I am not unmindful of the fact that, as pointed out by Mr. Muggleston, lesser amounts have been awarded by this Court and the North Eastern Native Appeal Court as damages for apparently equally or more severe injuries but those cases, whilst also instructive, must give way to *Radebe's* case, being, as it is, a decision of the Appellate Division.

In the result the appeal should be dismissed, with costs.

Yates and Johnson, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

GUNDWANA vs. **SITCHINGA.**

N.A.C. CASE No. 4 OF 1961.

UMTATA: 9th June, 1961. Before Balk, President; Yates and Johnson, Members of the Court.

NATIVE CUSTOM.

Nqoma *and* Mafisa *transactions—Customary in emergency for stock to be* nqomaed *or* mafisaed *with close relatives.*

PRACTICE AND PROCEDURE.

Appeal—Application for condonation of late noting—Considerations where Applicant's attorney solely to blame.

Summary: Plaintiff unsuccessfully sued Defendant in a Native Commissioner's Court for certain livestock or its value on the ground that it had been *mafisaed* to the Defendant

The Defendant in his plea denied the alleged *mafisa* and averred that he had purchased and paid for the stock.

It was manifest from the evidence for the Plaintiff that the Defendant was not related to him and that although he (the Plaintiff) had close relatives in the same location as the stock was and the Plaintiff had to either place it with others for safekeeping or dispose of it owing to an emergency, these relatives were not given any of the stock for safekeeping.

The appeal to this Court by the Plaintiff was noted late solely due to the inadvertance of his attorney.

Held: That the fact that the Plaintiff's close relatives who lived in the same location as the stock was, were not in the circumstances given any of the stock for safe-keeping is a departure from custom, as also Plaintiff's explanation that none of the stock was placed with relatives because they did not come and ask for it.

Held further: That, as it was clear that the applicant himself was in no way to blame for the late noting of the appeal but that the lapses were entirely due to the negligence of his attorney and as it also seemed clear that the Applicant intended all along that the appeal should be prosecuted, the Applicant should not be debarred from proceeding with his appeal solely on the ground of his attorney's negligence.

Cases referred to:

Batelo vs. Vapi, 1957 N.A.C. 74 (S), at page 75.
de Villiers vs. de Villiers, 1947 (1) S.A. 635 (A.D.), at page 637.

Appeal from the judgment of the Assistant Native Commissioner, Mount Fletcher.

Balk (President):

This is an application for condonation of the late noting of an appeal from the judgment of a Native Commissioner's Court for Defendant (now Respondent), with costs, in an action in which he was sued by the Plaintiff (present Applicant) for certain livestock or its value on the ground that it had been mafisaed to him.

The Defendant in his plea denied the alleged *mafisa* and averred that he had purchased and paid for the stock.

The proposed appeal from that judgment is on fact and on the further ground that the judgment should have been one of absolution from the instance to enable the Plaintiff to bring a fresh claim if he was able to procure further evidence.

The explanation for the delay in noting the appeal is that the applicant instructed his attorney timeously to do so but that the latter noted it late owing to an oversight due to his having gone on holiday shortly after being instructed and that the further delay occasioned by insufficiently stamping the notice of appeal is also due solely to the attorney's inadvertence. As it is clear that the Applicant himself was in no way to blame for the late noting of the appeal but that the lapses were entirely due to the negligence of his attorney and as it also seems clear that the Applicant intended all along that the appeal should be prosecuted, it seems to me that this is not a case in which the Applicant should be debarred from proceeding with his appeal solely on the ground of his attorney's negligence, see *Batelo vs. Vapi* 1957 N.A.C. 74 (S), at page 75.

However that may be, the merits of the proposed appeal were put in issue and it is quite clear from the Native Commissioner's judgment that the Applicant has no prospect of success on appeal so that the application fails on this ground alone, see *de Villiers vs. de Villiers,* 1947 (1) S.A. 635 (A.D.), at page 637.

That the Applicant has no prospect of success on appeal will be apparent from what follows. It is common cause that the Plaintiff was anxious to dispose of the livestock which he had inherited from his late father as he had left the district owing to their kraals having been burnt out on suspicion that they were concerned in stock theft and as the stock was no longer permitted to be kept at the trading station where the Plaintiff's father, who had met a violent death, had taken up his abode after his kraal had been burnt down.

According to the evidence for the Plaintiff by his brother, Rwetyana, they asked the trader to make known to the people their intention to give the stock out for safekeeping. But such a step does not accord with custom according to which contemplated transactions of this nature are not advertised but persons regarded by the family as suitable to be given the stock for safekeeping are approached to arrange for the stock to be so placed. It follows that the defence version that the advertisement at the trading station was that the stock would be sold is the more probable.

The evidence of the Plaintiff's mother, Nomakisi, for him, carries no weight in view of the blatant inconsistencies therein.

Then, as is manifest from the Plaintiff's evidence and that of Rwetyana, their close relatives in the same location as the stock was, were not given any of the stock for safekeeping which is a departure from custom. The Plaintiff's explanation for not placing any of the stock with his close relatives i.e. because they did not come and ask for it, is singularly unconvincing bearing custom in mind which dictated that the Plaintiff should have approached them in the matter. Moreover, Rwetyana stated that they were on good terms with their close relatives and there was no reason why the stock should not have been left with them. These factors indicate that the defence version that the stock was sold by the Plaintiff and not placed for safekeeping is the more likely.

Again, as is common cause, the defence witness, Marekeni, wrote down the names of the people who received the stock and gave the paper to the Plaintiff who admitted that he required this information in connection with the transfer of the stock in the dipping records to the persons to whom it was given. The Plaintiff's statement that he had thrown the paper away, therefore, makes the defence version that he had sold the stock the more probable for had he merely given the stock out for safekeeping he would have retained the paper as a record of the transaction. Moreover, the fact that the Plaintiff stated that he had thrown the document away lends colour to Marekeni's evidence that he also wrote on the paper the prices paid for the stock.

The Defendant and his witnesses gave reasonable explanations as to how they came to have the money which was paid for the stock at short notice so that this factor does not constitute an improbability in the defence case.

The foregoing probabilities were in the main relied upon both by the Native Commissioner and by Mr. Muggleston in his argument on behalf of the Respondent in opposing the application and there can be no doubt that they favour the Defendant's case and rebut that of the Plaintiff which disposes of Mr. Airey's argument on behalf of the Applicant. It need hardly be added that the Native Commissioner would not have been justified in entering absolution from the instance merely to enable the Plaintiff to bring a fresh claim if he was able to procure further evidence which, as was intimated in this Court, was not available.

Mr. Airey contended that the Native Commissioner's judgment should at most have been one of absolution seeing that the prayer in the Defendant's plea was for the dismissal of the summons which is tantamount to an absolution judgment. In making this submission he relied on *Singh vs. Singh,* 1952 (1) S.A. 26 (N.P.D.), at page 27. But as contended by Mr. Muggleston, this aspect is not covered by the grounds of appeal so that it does not call for consideration.

In the result the application should be refused, with costs.

Yates and Johnson, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

RONOTI vs. MEHLO.

N.A.C. CASE No. 7 OF 1961.

KING WILLIAM'S TOWN: 3rd July, 1961. Before Balk, President; Yates and Leppan, Members of the Court.

PRACTICE AND PROCEDURE.

Native Commissioner's Court Rules—provisions of Rule 41 (3) *are peremptory.*

Summary: In an appeal from a Native Commissioner's Court the presiding judicial officer stated, *inter alia,* in his reasons that his judgment for Plaintiff on a particular claim was in any event justified by reason of the fact that the Defendant's plea did not cover that particular claim. No written request for judgment on the claim in question was lodged by the Plaintiff as provided by Rule 41 (3) of the Rules for Native Commissioner's Courts.

Held: That the provisions of Rule 41 (3) of the Rules for Native Commissioner's Courts are peremptory so that if these provisions have not been complied with it is not legally competent to give judgment against a Defendant on the ground that he has failed to deliver a plea.

The following is an excerpt from the President's judgment, the remainder of the judgment not being material to this report:—

"In view of the Native Commissioner's conclusion that the judgment for the Plaintiff on the ejectment claim was in any event justified on the ground that the Defendant did not plead thereto, it is as well to add that even if the Defendant's plea was held not to cover that claim, it would not have been legally competent to have given judgment against him on that score for even if the Plaintiff did give written notice to him to plead, she did not lodge a written request for judgment as also required by Rule 41 (3) of the Rules for Native Commissioner's Courts, the provisions of which in both these respects are peremptory, see *Jones and Buckle's Civil Practice of the Magistrates' Courts* (Sixth Edition) at page 443 and the authorities there cited. It should be added that there is no trace in the record of the written notice to plead referred to by the Native Commissioner in his reasons for judgment."

Yates and Leppan, Members, concurred.

For Appellant: Mr. E. Heathcote of King William's Town.

For Respondent: Mr. B. Barnes of King William's Town.

NORTH-EASTERN NATIVE APPEAL COURT.

NDHLOVU vs. LUVUNO.

N.A.C. CASE No. 12 OF 1961.

ESHOWE: 19th April, 1961. Before Ramsay, President; King and Cornell, Members of Court.

PRACTICE AND PROCEDURE.

Adultery committed by wife by Christian marriage—damages awarded by Chief's court against adulterer.

Summary: Plaintiff sued Defendant for damages for adultery committed with Plaintiff's wife. The marriage was by Christian rites. Chief awarded damages and judgment confirmed by Native Commissioner who, however, reduced the amount awarded. The Native Commissioner realised his mistake and did not support his judgment.

Held: That a Chief has no jurisdiction to try any matter arising out of a civil marriage.

Case referred to:

Yeni vs. Jaca, 1953 N.A.C., 31.

Ramsay (President):

In this matter Plaintiff accused Defendant of having committed adultery with his wife to whom he is married by Christian rites and sued for £100 damages. The Chief gave judgment for £50 and costs.

On appeal to the Court of Native Commissioner the appeal was dismissed but the Chief's judgment was altered to one for Plaintiff for £20 and costs. There is no comment in the Native Commissioner's reasons for judgment for this alteration.

Defendant now appeals to this Court solely on the ground that the evidence does not support the judgment but applies to amplify his notice of appeal by inserting the ground that as the marriage was by Christian rites, the Chief had no jurisdiction to hear the case. The application is granted.

On the authority of *Yeni vs. Jaca,* 1953 N.A.C. 31, a Chief has no jurisdiction to try a case of this nature as his jurisdiction is limited to matters arising out of Native Law and Custom. Marriage by civil rites, being a common law institution, the marital rights of the husband fall to be determined by Common Law. This is admitted by the Native Commissioner in further reasons for judgment.

The appeal is accordingly allowed with costs and the Chief's judgment is altered to "Claim dismissed with no order as to costs".

I must comment adversely on the fact that the particulars of claim and reply differ in the Chief's written record and in the notice of hearing. Full reasons for judgment are required of a Chief and it is undesirable to condense his reasons on the form designed for the notice of hearing.

Any representations the Native Commissioner considers should be made regarding the practice of Chiefs should be made to the Chief Bantu Affairs Commissioner.

King and Cornell, Members concur.

For Appellant: W. E. White instructed by A. C. Bestall & Uys.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

MDLETSHE vs. MNDABA.

N.A.C. CASE No. 13 OF 1961.

ESHOWE: 19th April, 1961. Before Ramsay, President; King and Cornell, Members of Court.

PRACTICE AND PROCEDURE.

Admission of liability noted in Chief's record but Chief's reasons for judgment indicate that was not the ground for his judgment—Extension of time within which to appeal from Chief's Court refused by an Assistant Native Commissioner.

Summary: The record of a case tried by a Chief indicated that the Defendant had admitted liability but the Chief's reasons for judgment clearly showed that this was not the case. Defendant appealed late and asked for extension of the period in which to appeal. The matter was heard by an Assistant Native Commissioner.

Held: That as it was clear from the Chief's reasons for judgment that the Defendant had not admitted liability, Defendant was not estopped from further proceedings.

Held: That an Assistant Native Commissioner has no jurisdiction to grant or refuse an extension of time in which to appeal from a Chief's court.

Cases referred to:

Kunene vs. Madonda, 1955 N.A.C. 75.
Mahaye vs. Lutuli, 1952 N.A.C. 279.
Moloto vs. Moloto, 1953 N.A.C. 91.
Makatini vs. Makatini, 1955 N.A.C. 69.
Shandu vs. Mpungose 1955 N.A.C. 77.
Twala vs. Twala 1956 N.A.C. 137.

Legislation referred to:

Act No. 38 of 1927, Section 12 (1); Government Notice 2885 of 1951. Rule 9.

Appeal from court of Native Commissioner, Empangeni.

Ramsay (President):

In this matter Plaintiff claimed damages in a Chief's Court on 6th April, 1960. The Chief's written record records the Defendant's reply as "Admitted liability" and judgment for Plaintiff with costs.

On the face of it I would hold that Defendant is estopped from proceeding further with the matter as he admitted liability in the Chief's Court. If he denies such admission his proper course is not to appeal at this stage but to apply for rectification of the Chief's written record as laid down in *Kunene vs. Madonda,* 1955 N.A.C. 75. The Chief's lengthy reasons for judgment, however, do not state that he found for Plaintiff because Defendant admitted liability. They indicate that Defendant contested the claim and that the written record is incorrect in this respect. In view of this position the matter will be considered further.

On the 11th August, 1960, according to the Clerk of the Court, Defendant filed an appeal and a written application for condonation was made the following day. Plaintiff in evidence says it was "last month". The matter came up before the Assistant Native Commissioner who refused the application for condonation. Defendant now comes to this Court against that refusal on the grounds that the evidence did not support the judgment.

The point to be considered is whether the Assistant Native Commissioner had jurisdiction to hear the matter. Section 12 (1) of Act No. 38 of 1927 makes provision for appeals from Chief's Courts to Courts of Native Commissioner with the proviso that no Assistant Native Commissioner shall hear an appeal unless there is no Native Commissioner having jurisdiction in the area concerned. It is thus quite clear that the appeal from the Chief's Court in this case could not legally be heard by the Assistant Native Commissioner. Actually that judicial officer did not go so far as to try the appeal but merely refused an application for condonation.

Chief's Courts Rule 9 (3) reads: "The Native Commissioner may on good cause shown, extend the period prescribed in subsection (1) for noting an appeal". Does "Native Commissioner" in this context include an Assistant Native Commissioner? In my opinion it does not. Rule 9 (1) provides for an appeal to a Court of Native Commissioner wherein the Act lays down only a full Native Commissioner may adjudicate. There is no provision in the rules for an application for condonation of a late appeal which can be considered and dealt with as an action separate and apart from the appeal although there is nothing against such a procedure. The import of Rule 9 (3) seems to be that when a Native Commissioner is faced with an appeal which has been

noted out of the prescribed time he may, if he is satisfied that there is good reason for the delay, proceed with the hearing of the appeal. The Native Commissioner (meaning full Native Commissioner) in considering the "good cause" advanced, also considers whether the appellant has a reasonable prospect of success on appeal, (*Mahaye vs Lutuli,* 1952 N.A.C. 279; Moloto vs. *Moloto* 1953 N.A.C. 91; *Makatini vs. Makatini,* 1955 N.A.C. 69; *Shandu vs. Mpungose* 1955 N.A.C. 77; *Twala vs. Twala* 1956 N.A.C. 137). This is a function almost as important as the hearing of the appeal itself and inseparable from consideration of the merits of the case.

It is accordingly found that the Assistant Native Commissioner had no jurisdiction to hear the matter. The appeal is allowed and the proceedings held by the Assistant Native Commissioner set aside but as it turns on a point raised *meru moto* by this Court, there will be no order as to costs in this Court and that of the Native Commissioner.

King and Cornell, Members, concur.

For Appellant: D. A. C. Haines of D. A. C. Haines & Co.

For Respondent: F. P. Behrmann of H. H. Kent & J. G. Barnes.

NORTH-EASTERN NATIVE APPEAL COURT.

MVELASE vs. NJOKWE AND TWO OTHERS.

N.A.C. CASE No. 18 OF 1961.

Pietermaritzburg: 9th May, 1961. Before Ramsay, President; King and Fenwick, Members of the Court.

DAMAGES FOR ASSAULT.

Case brought under Native Custom—damages assessed under common law—quantum *of damages for permanent disablement —provocation.*

Summary: Plaintiff sued two young men for damages for assault and their kraal head as jointly liable for their delicts. Plaintiff had a piece of bone removed from his skull, leaving a permanent vulnerable spot and also acquired a permanent limp. These factors were not taken into account by the judicial officer in assessing damages and he also limited his award by reason of provocation.

Held: That damages of £27. 15s. were incompatible with the injuries inflicted and this amount was increased to £62. 15s.

Held: That in Native law it is not necessary to itemise the components of an award of damages.

Cases referred to:

Radebe vs. Hough, 1949 (1) S.A. 380.
Sigidi vs. Mfanana, 1954 N.A.C. (S) 50.
Sipongomana vs. Ntuku & Ors N.H.C. 1901, 26.
Mamisi & Ngcobo vs. Ngcobo, 1960 N.A.C. 7.

Works referred to:

"A Handbook of Tswana Law and Custom" by Shapera, pp. 258, 259.

"The Quantum of Damages" by Corbett & Buchanan.

Appeal from the Court of Native Commissioner, Ladysmith. King (Permanent Member):

Plaintiff sued the three Defendants jointly and severally for the sum of £477. 15s. and costs alleging that Nos. 1 and 2 had assaulted him with a weighted stick and fist involving him in the following damages:—

	£	s.	d.
Transport to hospital	1	0	0
Medical fees	1	15	0
General damages, bodily injury, indignity, pain and suffering, shock, disfigurement, loss of health and the amenities of life ...	475	0	0
Total	£477	15	0

Third Defendant was cited as jointly liable in his capacity as father and kraalhead.

The Defendants denied the assault, pleading that No. 1 had struck in self defence and alternatively, if it was found that No. 1 had assaulted Plaintiff, then it was done under severe provocation.

The Assistant Native Commissioner gave judgment in favour of the Plaintiff against Defendants 1 and 3 jointly and severally in the sum of £27. 15s. and costs, and granted absolution from the instance with costs in favour of the Second Defendant.

The Plaintiff appealed against this judgment in regard only to the amount granted in his favour.

Counsel for Plaintiff based his arguments on two points, viz: that the Assistant Native Commissioner had made two incorrect findings and that these had influenced him adversely in fixing the amount of damages awarded to the Plaintiff.

These two points were:—

(1) That he erroneously found that there was no permanent injury; and

(2) That he had erroneously found that there was some provocation for the assault.

A reference to the record makes it abundantly clear that he did, in fact, err as regards the nature of the injuries. There is ample evidence to show that a large piece of bone was removed from Plaintiff's head, that a year after the assault Plaintiff was still limping, that the limp was unlikely to disappear completely, that Plaintiff had spent 27 days in hospital and was treated as an outpatient for a further month, and that he had suffered considerable pain. The injury to the head has resulted in the Plaintiff having a vulnerable spot in his head unprotected by bone and a light blow, whether accidental or otherwise, might have serious results—his whole life is affected as he must exercise much more care than previously so as to avoid a head injury.

So far as the provocation is concerned this can be considered only in so far as the claim for damages relate to contumelia and not in relation to the other alleged damages—*Radebe vs. Hough* 1949 (1) S.A. 380. As the alleged contumelia is negligible in relation to the other damages and, moreover, the Assistant Native Commissioner came to the conclusion that Plaintiff had given some provocation and, further, as this Court is not in a position to say that the presiding officer has erred in coming to that conclusion, this Court feels that it must disregard the claim in so far as it refers to contumelia.

Counsel for Defendant countered the appeal for increased damages by arguing that the representations made on behalf of the Plaintiff were based upon common law whereas in the present case it was clear from the record that the Judicial Officer had applied Native law and, further, as the summons had joined the kraalhead in the claim, the Plaintiff himself had invoked Native law. The argument was then advanced that it was incumbent upon the Plaintiff to show that the sum of £25 was inadequate under Native law. Mr. Menge, for Defendants, quoted pages 258 and 259 of " A Handbook of Tswana law and custom " by Schapera wherein it is said that in an assault case a levy of from one to three cattle is made against the person responsible and that, of recent times, the Chief would award part or all his " fine " to the victim. He also quoted *Sigidi vs. Mfanana and Another* 1954 N.A.C. (S) 50 where it was accepted that in the District of Xalanga the average value of cattle paid as damages for seduction was £8 per head. From these he argued that the maximum payable would be 3 head of cattle valued at approximately £25—the amount awarded in the trial court in this particular case. This Court, however, cannot accept that the Xalanga case is any authority for fixing the value of cattle in this area or at this time at £8 per head nor can it accept that Schapera's work sets out the number of cattle payable in Natal.

The contention that Native law, and not common law, must be applied is, of course, correct.

There is no need to dwell on the contention that an action for damages does not lie in Native law pertaining in Natal. This point was dealt with in *Sipongomana vs. Ntuku* and Others, N.H.C. 1901 at page 26. It was held here, *inter alia*, that whatever the power of the autocratic and paramount Chief had been prior to the advent of the white man's law an individual's right of reparation for injuries sustained by him was based on simple natural justice. On numerous subsequent occasions this principle has been followed in this Court.

It was laid down in *Mamisi & Ngcobo vs. Ngcobo*, 1960 N.A.C. 7 that Native law was not as exacting as common law in regard to itemising damages and that the court could assess and give judgment for general damages which include everything that under common law would have to be detailed. In assessing the *quantum* of damages there is no necessity to consider awarding cattle although had this case been settled according to the Bantu rules of ettiquette applicable to what might be termed the *amende honorable* it is highly probable that a beast or a goat would have been presented for slaughter. There are few reported cases under Native law which this Court can use as a basis for the assessment of damages for assault. However, in the unreported case of *Dhlamini vs. Zulu and Another* heard in this Court on 11th January, 1961, the court awarded a woman damages amounting to £80 in respect of the loss of an eye and in the unreported case *Mtembu vs. Tshabalala and Another* heard on 23rd March, 1961, this Court granted general damages amounting to £50 in a case which was practically on all fours with the present one. In both the above cases Native law was applied.

In the present case, therefore, general damages amounting to £60 are considered reasonable and as the amount awarded by the trial court differs substantially from this amount it must be altered.

The appeal is allowed with costs and the award in the court below is altered to £62. 15s.

Ramsay, President and Fenwick, Member, concurred.

For Appellant: E. B. Howard instructed by Christopher, Walton & Tatham.

For Respondent: Adv. W. O. H. Menge instructed by Hellet & De Waal.

NORTH-EASTERN NATIVE APPEAL COURT.

MADHLALA vs. NZAMA AND SHAZI.

N.A.C. CASE No. 21 OF 1961.

PIETERMARITZBURG: 9th May, 1961. Before Ramsay, President; King and Fenwick, Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Commissioner's Court—European representing Native estate substituted for Native as Plaintiff.

Summary: A Native executor dative of a Native estate sued in the Native Commissioner's Court. Before evidence was heard, a European executor dative was, by consent, substituted as Plaintiff and the case proceeded to judgment before the Native Commissioner. Appeal was made on the merits but the Appeal Court *mero moto* decided the issue on the matter of jurisdiction.

Held: That a Native Commissioner's Court has no jurisdiction to try a case in which a European is a party and that an European cannot be substituted for a Native as a party in a case tried by a Native Commissioner.

Cases referred to:

Manyurola vs. Gillet N.O., 1961 P.H., R. 3.

Balfour vs. Balfour, 1922 W.L.D. 133.

Works referred to:

Hahlo, page 414.

Appeal from the Court of Native Commissioners, Port Shepstone.

Ramsay (President):

The history of this matter is that a Native, David Madhlala, died leaving a will and an administrator dative was appointed on the 27th June, 1956, by the Master of the Supreme Court. This administrator was Joubert Nzama, a Native, and Plaintiff who, with a second Plaintiff, issued summons in this case on 31st October, 1956.

The exhibits contain other letters of administration, dated 14th January 1959, appointing George Eriksson, an European, as executor dative in place of Joubert Nzama.

The case came on trial before the Native Commissioner of Port Shepstone on the 9th November, 1959, when the attorney for the Plaintiffs applied for amendment of the summons by the substitution of the name "George Eriksson" for that of "Joubert Nzama" in the summons. The amendment was allowed and the leading of evidence proceeded. Judgment was given for first Plaintiff (the executor). The Defendant appealed to this Court on grounds connected with the merits of the case, which, for purposes of this appeal, have not been considered.

I instructed the Registrar to draw the attention of the parties attorneys to the case of *Manyurola vs. Gillet* N.O., 1961 P.H. R. 3, in which it was held that a Native Commissioner has no jurisdiction to try a case in which one of the parties is not a Native.

Mr. Juul, for the Appellant, conceded that the Native Commissioner had no jurisdiction, so his judgment must be set aside, and that Section 10 (1) of Act No. 38 of 1927 is imperative.

Mr. Pape, for the Respondent, submitted that this case is differentiated from that of *Manyurola vs. Gillet*. In that case Gillet, an European, initiated action and the Native Appeal Court rightly held that he had no *locus standi in judicio*. In the present case, however, a Native initiated action and jurisdiction once founded does not change because of a change in the status of the Plaintiff. He quoted the instance of a Coloured man, living as a Native in a Native location, thus acquiring the legal status of a Native, changing his domicile to a European area during the trial of a case. He maintained the Coloured man would continue to be within the jurisdiction of the Court in which the action commenced.

Mr. Pape also quoted the case of *Balfour vs. Balfour* 1922 W.L.D., 133, and Hahlo, page 414. He also cited the imaginary case of a party dropping dead and asked if it would then be necessary for a complete retrial to take place.

It is unnecessary to deal with these points; the issue at stake in the present trial is as follows:—

> A Native issued summons in a Native Commissioner's Court. Prior to any evidence being heard, an application to substitute an European as Plaintiff was allowed. A European has no *locus standi* in a Native Commissioner's Court.

In the instances quoted by Mr. Pape, the point at issue was the status of a party to a case changing owing to his change of domicile during the proceedings, whereas in this matter one individual of a different race has been substituted for another.

The judicial officer was therefore wrong in allowing the amendment and the proposed new Plaintiff should have re-commenced the action in a Magistrate's Court. It might have been possible, by consent, to consider the existing pleadings as pleadings in the fresh case.

The appeal is allowed and the Native Commissioner's judgment, *in toto*, is set aside. Both counsel before this Court agree that there should be no order as to costs.

King and Fenwick, Members, concurred.

For Appellant: Adv. T. Juul instructed by Mason & Leisegang.

For Respondent: Adv. D. L. Pape instructed by Forder, Ritch and Eriksson.

SOUTHERN NATIVE APPEAL COURT.

SIBEWU vs. **BOMBA.**

N.A.C. CASE No. 13 OF 1961.

UMTATA: 25th September, 1961. Before Balk, President, Yates and Midgley, Members of the Court.

PRACTICE AND PROCEDURE.

Plea of repayment by defendant—Legal implications of resultant onus of proof on him.

Summary: The plaintiff sued the defendant in a Native Comissioner's Court for eight head of cattle (later reduced to seven head as the death of one beast was conceded) or their value and a horse or its value, averring in his summons that the defendant's father, Bomba, had received and disposed of this quantum of dowry stock of which the plaintiff was the "eater" and that the defendant was the late Bomba's heir.

In his plea the defendant admitted that he was the late Bomba's heir and that the plaintiff was the "eater" of the dowry in question but denied any liability therefor on the ground that Bomba had disposed of only five of the cattle and a horse and that this stock had been repaid to the plaintiff. The defendant further alleged that the dowry consisted only of seven head of cattle and a horse and that two of the cattle had died.

The implications of this plea are set out in the following passages from the President's judgment, the remainder of that judgment not being material to this report:

> "As the defendant pleaded the repayment of the five head of cattle and the horse, the sole onus of proof in respect of this stock rested on him so that if he established the alleged repayment or any part thereof, he was entitled to judgment accordingly; otherwise judgment fell to be entered for the plaintiff for such of the stock or its value that the defendant failed to prove he had repaid, there being no room here for absolution from the instance, as contended by Mr. Almon in his argument on behalf of the appellant, see *Arter vs. Burt* 1922 A.D. 303, at page 306. The position is of course different as regards the remaining two head of cattle claimed, the absolution judgment being competent on this score as the onus of proof on the pleadings here rested on the plaintiff in that the defendant denied in his plea that Bomba had received the one beast and that he had disposed of the other.
>
> It is apparent from the Native Commissioner's reasons for judgment that he misdirected himself as regards the incidence of the onus of proof insofar as the five head of cattle and the horse which were alleged by the defendant to have been repaid, are concerned, the Native Commissioner being under the erroneous impression that there was still an over-all onus on the plaintiff to prove that Bomba had received and disposed of all the stock claimed."

Yates and Midgley, Members, concurred.

For Appellant: Mr. H. Almon of Port St. Johns.
For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN NATIVE APPEAL COURT.

ADONIS vs. NDZEKENE AND ANO.

N.A.C. CASE No. 15 OF 1961.

UMTATA: 26th September, 1961. Before Balk, President, Yates and Midgley, Members of the Court.

PRACTICE AND PROCEDURE.

Absolution judgment—Application for at close of plaintiff's case—Test to be applied—Such test, which only criterion on appeal, not put in issue then.

Summary: The position appears from the President's judgment.

Held: That when a judgment of absolution from the instance is applied for at the close of plaintiff's case the test to be applied is whether there is evidence on which a reasonable man *might* find for the plaintiff and not whether the Court *ought* to do so.

Held further: That as the point on which the appeal turns, viz., whether the Native Commissioner applied the correct test in decreeing an absolution judgment after the close of plaintiff's case, was not put in issue by the grounds of appeal, the appeal should be dismissed.

Cases referred to:

Ndongeni vs. Ngodwana 1 N.A.C. (S.D.) 93.
Calela vs. Nguqulwa 1961 (1) P.H., R13 (S.N.A.C.)

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance, with no order as to costs, at the close of the plaintiff's case at the instance of the defendants' attorney in an action in which the plaintiff (present appellant) sued the two defendants (now respondents) for certain damages for the seduction and pregnancy of his daughter.

The onus of proof on the pleadings rested on the plaintiff.

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of the evidence, the facts proved and the probabilities of the case.

2. That the judgment is bad in law in that the Plaintiff's daughter having given evidence on oath that she was seduced and rendered pregnant by the 1st Defendant and the 1st Defendant not having rebutted that evidence on oath, it was incompetent for the Court to have given a judgment of absolution from the instance as the woman's word should have been believed that 1st Defendant is the author of her pregnancy and father of the child of whom she is pregnant."

As absolution was decreed at the close of the plaintiff's case without the defendants having adduced evidence or closed their case, the test to be applied is whether there is evidence on which a reasonable man *might* find for the plaintiff and not whether the Court *ought* to do so, see *Ndongeni vs. Ngodwana* 1 N.A.C. (S.D.) 93 and the authorities there cited.

The first ground of appeal is not apposite as it postulates a trial in which both parties closed their cases which is not the position here, see *Galela vs. Mguqulwa* 1961 (1) P.H., R13 (S.N.A.C.).

It is by no means clear to me what the purport of the second ground of appeal is. But whatever its purport may be, it does not put the test referred to above in issue as the criterion therein is that the evidence for the plaintiff *should* have been believed by the Court and not that a reasonable man *might* have done so so that it also postulates a trial in which both parties closed their cases, and is, therefore, also of no application here.

Mr. Knopf who appeared on behalf of the appellant, found himself unable to contest this position.

It follows that the point on which the appeal turns is not covered by the grounds embodied in the notice of appeal and as, in terms of Rule 16 of the Rules of this Court, an appellant is limited to such grounds where, as here, no application is made for the inclusion of additional ones, the appeal should be dismissed, with costs.

The necessity for drawing up proper grounds of appeal must again be stressed.

Yates and Midgley, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.
For Respondents: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

FITSHANE vs. **MBALEKWA.**

N.A.C. CASE No. 16 OF 1961.

UMTATA: 26th September, 1961. Before Balk, President, Yates and Midgley, Members of the Court.

NATIVE CUSTOM.

Nqoma *of cattle to woman.*

PRACTICE AND PROCEDURE.

Admission in pleadings—Consequences of—Contradiction of by evidence.

Summary: It was contended in the Native Commissioner's Court in this case that the *nqoma* of cattle to a woman was contrary to custom.

One of the grounds of appeal was that the Native Commissioner's Court erred in relying upon an admission by the defendant in his plea of a certain paragraph of plaintiff's particulars of claim as it was an apparent error. No application was made in the Native Commissioner's Court for the withdrawal of the admission by the amendment of the plea and evidence was adduced by the defence during the course of the hearing of the trial action contradicting the admission.

Held: That the *nqoma* of cattle to a woman was not contrary to custom.

Held further: That an admission in the pleadings stood until withdrawn by an amendment of the pleadings granted by the Court on application.

Held further: That it was not competent for the party who made the admission to adduce evidence contradicting it whilst it stood.

Cases referred to:

Gordon vs. Tarnow 1947 (3) S.A. 525 (A.D.), at pages 531 and 532.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he claimed from the defendant (present appellant) certain four head of cattle or their value, £64.

The action was a vindicatory one and the onus of proof on the pleadings rested on the plaintiff.

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of the evidence, the facts proved and the probabilities of the case.

2. That the admission of paragraph 3 of the Plaintiff's particulars of claim relied on by the Court was an apparent error and that such admission is inconsistent with the Plea as a whole and that the ownership of the cattle by the Plaintiff was specifically denied in paragraphs 2 and 4 of the Plea."

Mr. Knopf who appeared for the appellant intimated that he was unable to support the appeal and in my view properly so as will be apparent from what follows.

The Assistant Native Commissioner gives cogent reasons for finding that the plaintiff established his case. He gave due consideration to the discrepancies in the evidence for the plaintiff and to the fact that the plaintiff neither earmarked nor inspected the cattle regularly. He properly found that these discrepancies were of a minor nature and he took into account that the cattle grazed and were dipped in the same location as that in which the plaintiff resided so that his failure to earmark and inspect the cattle regularly lost much of its significance. As pointed out by him, the defendant's contention that the cattle were paid as dowry for the judgment debtor's daughter, Nomarelia, is founded on surmise and, therefore, does not advance his case. Another point arising out of this contention calls for consideration and that is the defendant's evidence that there were no cattle in the judgment debtor's kraal when he (defendant) obtained judgment against him and that the cattle only came to that kraal later in 1957 which is contrary to the plaintiff's case that the cattle were *ngomaed* with the judgment debtor's wife about ten years previously i.e. in about 1951 and have remained there ever since. Little weight can, however, be attached to the defendant's evidence in this respect in view of his obviously unsatisfactory explanation, commented on by the Native Commissioner, for releasing the same cattle when claimed by the plaintiff after they had been attached previously in satisfaction of the same judgment. The contention that the *ngoma* of cattle to a woman is contrary to custom is fallacious as found by the Native Commissioner. The first ground of appeal accordingly fails.

There is no substance in the remaining ground of appeal as it is clear from the Native Commissioner's reasons for judgment that he did not take into account the fact that the averment in paragraph 3 of the particulars of claim was admitted in the defendant's plea; in any event an admission in a plea stands and it is not competent for the party who made it to adduce evidence contradicting it unless the admission is withdrawn by an amendment to the pleadings granted by the Court on application and no such application was made in the instant case, see *Gordon vs. Tarnow* 1947 (3) S.A. 525 (A.D.), at pages 531 and 532.

The appeal should, therefore, be dismissed with costs.

Yates and Midgley, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.
For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

WALI vs. HLAKAHLELA.

N.A.C. CASE No. 17 of 1961.

Umtata: 29th September, 1961. Before Balk, President, Yates and Slier, Members of the Court.

PRACTICE AND PROCEDURE.

Judgment for defendant—When competent. Costs of appeal on alteration of judgment from one for defendant to one of absolution.

Summary: From a Native Commissioner's reasons for judgment on appeal it appeared that he had found for defendant merely because the plaintiff had failed to prove his case. From those reasons it also appeared that he considered that the defendant had not established his case.

There appeared to be no probability of the plaintiff having anything further to advance or of adducing further evidence.

Held: That as the defendant had not established his case the Native Commissioner was wrong in giving judgment for him merely because the plaintiff had not discharged the onus of proof resting on him on the pleadings and should have decreed absolution from the instance instead.

Held further: That as the alteration of the Native Commissioner's judgment on appeal from one for the defendant to one of absolution from the instance was one of form and not of substance, such alteration did not entitle the appellant to the costs of appeal.

Cases referred to:

Landingwe vs. Hlatuka 1952 N.A.C. 90 (S), at page 91.
van der Schyf vs. Loots 1938 A.D. 137, at page 145.

Statutes etc. referred to:—

Rule 54 of the Rules for Native Commissioners' Courts.
Section *thirty-eight* of Proclamation No. 145 of 1923.

Balk (President):

"Good cause having been shown the late noting of the appeal was condoned.

The appeal is from the judgment of a Native Commissioner's Court for defendant (now respondent), with costs, in an action in which the plaintiff (present appellant) sued him for five head of cattle or their value, £15. 0 0 each, as damages for adultery with his wife, Maphungulelweni.

In his plea the defendant denied the alleged adultery so that the onus of proof rested on the plaintiff.

The appeal is brought solely on fact."

The President then analysed the evidence for the plaintiff and came to the conclusion that he had not discharged the onus resting on him on the pleadings of proving the alleged adultery and was therefore not entitled to judgment. The President then proceeded as follows:—

"But, the defendant also was not entitled to judgment unless he established his case, the correct judgment if both parties failed to do so being absolution from the instance, see *Landingwe vs. Hlatuka* 1952 N.A.C. 90 (S), at page 91,

and paragraphs (*a*), (*b*) and (*c*) of Rule 54 of the Rules for Native Commissioners' Courts, the provisions of which correspond with those of paragraphs (*a*), (*b*) and (*c*) of section *thirty-eight* of Proclamation No. 145 of 1923 mentioned in that judgment.

It would appear from the concluding sentence of the Native Commissioner's reasons for judgment that he found for the defendant solely because the plaintiff had failed to prove his case. It would also appear from those reasons that the Native Commissioner considered that the defendant had not established his case for he states that there is a possibility of the plaintiff's contention being true."

After analysing the evidence for the defendant the President found that he had not established his case and that the Native Commissioner was wrong in giving judgment for him and should have decreed absolution from the instance.

The President further found that, as contended by Mr. Muggleston, who appeared on behalf of the respondent, the alteration of the judgment for defendant to one of absolution from the instance should not affect the costs of appeal as there appeared to be no probability of the plaintiff having anything further to advance or of adducing further evidence so that the alteration became one of form and not one of substance.

Yates and Slier, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.
For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MHATU vs. FAYO.

N.A.C. CASE No. 19 OF 1961.

UMTATA: 25th September, 1961. Before Balk, President, Yates and Midgley, Members of the Court.

NATIVE CUSTOM.

Adultery—Repeated acts—Question of husband making his wife's adultery source of gain.

Summary: Plaintiff (now respondent) successfully sued defendant (present appellant) for damages for adultery with his (plaintiff's) wife, followed by pregnancy.

The evidence revealed that the defendant had paid damages on two prior occasions on which he was alleged to have committed adultery with the plaintiff's wife. The adultery on which the claim for damages in the instant case was based, was committed by the defendant whilst the plaintiff's wife was residing at the plaintiff's kraal and during the latter's absence at work.

The appeal was brought, *inter alia*, on the ground that:—

"The presiding judicial officer erred in awarding damages to the plaintiff when the evidence clearly showed that the plaintiff's wife persisted in continuous adultery and immorality and it was quite apparent that the imposition of prior penalties had had no deterrent effect. The Court should not have permitted the plaintiff to make his wife's immorality a source of gain".

Held: That, as the adultery on which the instant claim was based, was committed by the defendant with the wife of the plaintiff whilst she was residing at the plaintiff's kraal and during the latter's absence at work and as defendant had been made to pay damages for adultery committed with her on prior occasions, the plaintiff had every right to think that the defendant would be deterred from doing so again and there could be no question of the husband making his wife's adultery a source of gain and public policy demanded that the defendant be mulcted in damages again.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the defendant (present appellant) for five head of cattle or their value, £50, as damages for adultery with his wife, Maswelinkomo, followed by pregnancy.

In his plea the defendant denied the alleged adultery so that the onus of proof rested on the plaintiff.

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of the evidence, the proved facts and the probabilities of the case as a whole.

2. That the presiding Judicial Officer erred in awarding damages to the Plaintiff when the evidence clearly showed that the Plaintiff's wife persisted in continuous adultery and immorality and it was quite apparent that the imposition of prior penalties had had no deterrent effect. The Court should not have permitted the Plaintiff to make his wife's immorality a source of gain."

The evidence of the plaintiff's wife, Maswelinkomo, that the defendant committed adultery with her and rendered her pregnant as alleged in the summons is borne out by the plaintiff's witness, Madinabantu. Admittedly, there is a discrepancy between Maswelinkomo's evidence and that of Madinabantu as to when the former fell pregnant. But this discrepancy cannot be regarded as important as it may well be due to faulty recollection on Madinabantu's part bearing in mind that she was testifying to an event that had occurred over two years previously.

The discrepancy between their evidence as regards where the adultery took place, relied upon by Mr. Knopf in his argument for the appellant, is obviously more apparent than real and is of minor importance.

A further point taken by Mr. Knopf, viz. that the fact that the go-between, Madinabantu, did not accompany the party taking Maswelinkomo's "stomach" to the defendant was a breach of custom, is without substance as neither Madinabantu nor any of the plaintiff's other witnesses were asked why she did not do so and there may be a good reason therefor. The Assistant Native Commissioner cannot, therefore, be said to be wrong in having preferred the evidence for the plaintiff to the defendant's bare denial particularly in the light of the blatant improbability in his evidence and that of his brother that the latter paid the balance of the damages for the adultery alleged to have been committed by the defendant with Maswelinkomo on a prior occasion notwithstanding that the defendant had returned home and denied it. This disposes of the first ground of appeal.

The remaining ground of appeal was not pressed by Mr. Knopf and, properly so, as the position in the instant case is distinguishable from that in *Gomfi vs. Mdenduluka* 3 N.A.C. 21 and *Langa vs. Mtwazi* 5 N.A.C. 11. In these cases the plaintiff's wife continued to live with the defendant as his wife and the plaintiff took no steps to obtain her return or the refund of her dowry so that the Court held that the plaintiff's conduct amounted to profiting by his wife's immorality and, therefore, on the ground of public

policy refused to award damages to him for his wife's continued adultery. In the present case, however, the defendant committed the adultery on which the claim is based whilst the plaintiff's wife was residing at the plaintiff's kraal and during the latter's absence at work; and as the defendant had been made to pay damages for each of the two prior occasions on which he had committed adultery with the plaintiff's wife, the plaintiff had every right to think that the defendant would be deterred from doing so again. Consequently there can be no question here of the plaintiff's making his wife's adultery a source of gain. On the contrary, public policy demands that the defendant be mulcted in damages again in the hope that it will act as a deterrent. A similar view was taken in *Mondli vs. Buza* 1 N.A.C. 160, referred in *Gomfi's* case (*supra*), and impliedly also in *Celegwana vs. Magudlwena* 4 N.A.C. 26, in both of which the circumstances were in essence akin to those in the instant case.

The second ground of appeal, therefore, also fails and the appeal should be dismissed, with costs.

Yates and Midgley, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.
For Respondent: Mr. H. Almon of Port St. Johns.

SOUTHERN NATIVE APPEAL COURT.

MONI vs. **KETANI.**

N.A.C. CASE No. 20 OF 1961.

UMTATA: 29th September, 1961. Before Balk. President, Yates and Slier, Members of the Court.

DOWRY CATTLE.

Value of dowry cattle refundable on dissolution of customary union.

Summary: A Native Commisioner's Court entered judgment for plaintiff for the return to him of his wife by a certain date, failing which the refund to him of seven head of cattle or their value, £70 0 0 (R140.00), in respect of the dowry he had paid for her.

In his claim plaintiff had placed a value of £142 0 0 on the seven head of cattle.

The plaintiff appealed on the ground that the value placed on the cattle by the Native Commissioner was inadequate.

Held: That, as the defendant no longer owned the original cattle paid in respect of the dowry which would, in the ordinary course, have been returnable, the plaintiff was entitled to recover from the defendant as an alternative to the delivery of seven head of cattle of the type usually paid as dowry, the average amount it would cost him per beast to acquire such cattle where he showed that this amount exceeded the standard value of such cattle in the district.

Cases referred to:

Mdinge vs. Kotshini 1 N.A.C. (S.D.) 270.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (present appellant) for the return to him of his wife, No-aron, by the 30th April, 1961 or, failing such return, that the defendant (now respondent) refund to him seven head of cattle or their value, £70 0 0 (R140.00) in respect of the dowry he had paid for her.

In his action in that Court against the defendant the plaintiff sought this relief except that he claimed £142 as the value of the seven head of cattle refundable in the event of his wife's failure to return to him.

The appeal is brought on the following grounds:—

"(*a*) That the Judicial Officer erred in placing a value of R20.00 per head on the cattle claimed by the Appellant, in the light of the evidence adduced by the appellant as to present day average value of dowry cattle.

(*b*) That generally the judgment is against the weight of evidence and the probabilities."

It is not disputed that the plaintiff's wife deserted him and refused to return and it is common cause that seven head of cattle are refundable in respect of the dowry paid for her and that the defendant no longer owns the original stock paid in this respect. The only matter in dispute is the value placed by the Native Commissioner in his judgment on the cattle refundable.

The Native Commissioner found that the standard value of cattle in the district concerned i.e., in the Kentani District, was £10 0 0 per beast, as alleged by the defendant in his evidence, and in his judgment the Native Commissioner placed this value on the cattle refundable. In coming to this conclusion, the Native Commissioner was, according to his reasons for judgment, influenced, firstly, by the admission in the course of his evidence for the plaintiff by one, Egelhof, presently Messenger of the Court at Willowvale and formerly at Kentani, that in warrants of execution the value of £10 0 0 per beast was placed on dowry stock more frequently than higher values and, secondly, by the fact that, according to the Native Appeal Court Reports, the value of dowry cattle had been accepted at £10 0 0 per beast in the neighbouring District of Komga in a 1956 case and at £8 0 0 per beast in the nearby Elliotdale District in a 1959 case. The Native Commissioner, however, appears to have lost sight of the fact that, as laid down in *Mdinge vs. Kotshini* 1 N.A.C. (S.D.) 270 and the authorities cited at page 272 of the report of that case, relied upon by Mr. Airey in his argument on behalf of the appellant, the plaintiff in the instant case was entitled to recover from the defendant as an alternative to the delivery of seven head of cattle of the type usually paid as dowry, the average amount it would cost him per beast to acquire such cattle if he could prove that this amount exceeded the standard value of such cattle in the district seeing that the defendant no longer owned the original cattle paid in respect of the dowry in question which would, in the ordinary course, have been returnable. That being so and as from the uncontroverted evidence of the plaintiff's witness, Harrison, presently Messenger of the Court, Kentani, it is manifest that the current value in that district of cattle of the type usually paid as dowry, as fixed by the prices fetched at both public and private sales, ranged from £8 to £35 per beast and thus averaged £21. 10s. per beast, the plaintiff was entitled to have the value of the cattle refundable fixed at the lastmentioned figure, i.e. at £21. 10s. per head making a total of £150. 10s. for the seven head and judgment should, therefore, have been entered in respect of the £142 0 0 claimed, this being the lesser figure.

It is true that Harrison stated that old cattle fetched from £1. 10s. to £3 per head but it is obvious that he had in mind very old cattle which would be below the standard usually paid for dowry, being of the type which were, according to Egelhof, sold for their skins. The latter's evidence, it may be added, supports that of Harrison as regards the prices fetched at public sales for the type of cattle concerned. As pointed out by Mr. Airey, Harrison's evidence in this respect also gains support from the defendant's evidence that had the original dowry cattle been in his possession and had he wished to retain them he would have given £25 each for them.

In the result the appeal should be allowed, with costs, and the judgment of the Native Commissioner's Court altered by substituting the sum "£142 (R284.00)" for the sum "£70 (R140.00)".

Yates and Slier, Members, concurred.

For Appelant: Mr. F. G. Airey of Umtata.
For Respondent: Mr. K. Mugglcston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

YAKO vs. KUNTU DANDALA AND ANOTHER.

N.A.C. CASE No. 22 OF 1961.

UMTATA: 21st September, 1961. Before Balk, President, Yates and Collen, Members.

PRACTICE AND PROCEDURE.

Default judgment in action for damages entered by Clerk of Court—Effect of—Application for rescission of such judgment—Non-observance of requirements.

Summary: This was an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application for rescission of a default judgment entered by a clerk of court in an action for damages for seduction.

The Native Commissioner gave as one of his reasons for refusing the application that the default judgment, being void *ab origine,* there was no judgment to rescind.

On appeal one of the points taken by the Attorney for the Appellant was that the application for rescission was defective in that the facts relied upon as vitiating the default judgment, were not set out in the application. It was, however, manifest from the record that these facts were outlined at the hearing of the application in the Native Commissioner's Court.

Held: That in view of the peremptory provisions of sub-rule (4) read with sub-rule (7) of Rule 41 of the Rules for Native Commissioner's Courts, default judgment in a case in which damages are claimed may only be entered by the Court itself as distinct from the Clerk of Court and a default judgment entered by a Clerk of Court in such a case is void *ab origine.*

Held further: That such default judgment is, however, a judgment of the Court and remains in force until properly attacked and rescinded

Held further: That the non-disclosure in the application for rescission of the default judgment of the facts relied upon as vitiating it was at this, the appeal, stage in the circumstances of no consequence.

Case referred to:

Ramodike vs. Mokeetsi Trading Store 1955 (2) S.A. 169 (T.P.D.), at pages 171 and 172.
Ngosa and Others vs. Regina 1961 (1) P.H., M.8 (F.S.C.).
Jones and Buckles' Magistrates' Courts Practice (Sixth Edition) at page 116.

Statutes etc. referred to:

Rules 39, 41, 73 and 74 of the Rules for Native Commissioner's Courts.

Native Administration Act, 1927, section fifteen.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application for rescission of a default judgment entered by the Clerk of that Court in an action in which the claim was for damages for seduction.

The appeal is brought on the ground that the Native Commissioner erred in refusing the application in that the default judgment was void *ab initio.*

As the claim was for damages the entry of the default judgment by the Clerk of the Court on the ground that the defendant had failed to enter an appearance to defend within the period allowed by Rule 39 of the Rules for Native Commissioners' Courts was not legally competent regard being had to the peremptory provisions of sub-rule (4) read with sub-rule (7) of Rule 41 that in such a case judgment may be entered only by the Court itself as distinct from the Clerk of the Court. It follows that the judgment is void *ab origine* and is rescindable in terms of Rules 73 (*b*) and 74 submitted by Mr. Knopf in his argument on behalf of the appellant.

The Additional Native Commissioner states in his reasons for refusing the application to rescind the default judgment that the point taken that that judgment is void *ab origine* falls outside the scope of the application. But this is manifestly not so for it is averred in the supporting affidavit relied upon in the application for rescission that the default judgment is void. The only other reason given by the Native Commissioner for the refusal of the application is that, the default judgment being void *ab origine,* there was no judgment for the Court to rescind. This reason is equally untenable in the light of the provisions of Rules 73 (*b*) and 74 and bearing in mind that a judgment of a court of record remains in force even where the Court has exceeded its jurisdiction in giving it or where the judgment may otherwise be invalid until it is properly attacked and rescinded by a Court of competent jurisdiction, see *Ramodike vs. Mokeetsi Trading Store* 1955 (2) S.A. 169 (T.P.D.), at pages 171 and 172, and *Ngosa and others vs. Regina* 1961 (1) P.H., M.8 (F.S.C.).

In connection with the lastmentioned reason given by the Native Commissioner, Mr. Airey who appeared in this Court for the respondent, contended that as the Clerk of the Court had no jurisdiction to give the judgment it could not be regarded as a judgment of the Court and that, therefore, there was nothing to rescind as stated by the Native Commissioner. But this contention loses sight of the fact that the Clerk of the Court is empowered by Rule 41 (4) to enter default judgments and that any such judgment falls to be regarded as a judgment of the Court and, as pointed out above, it stands and is presumed to be binding until it is rescinded.

A further point taken by Mr. Airey was that the application for rescission was defective in that the facts relied upon as vitiating the default judgment, were not set out in the application. In this connection he referred the Court to *Jones and Buckles' Magistrates' Courts Practice* (Sixth Edition) at page 116 and the authority there cited. It is, however, manifest from the record that these facts were outlined at the hearing of the application in

the Native Commissioner's Court so that the respondent was not prejudiced by the omission to insert the facts in the application and it becomes at this, the appeal stage, a mere technicality of no substance; see also the proviso to section fifteen of the *Native Administration Act,* 1927, where this principle is entrenched.

The averments in the applicant's supporting affidavit that he was not in wilful default and that he has a good defence are denied in the replying affidavits filed by the respondent in the Native Commissioner's Court. These issues were not tried in that Court as ought to have been done in view of the provisions of sub-rule (5) of Rule 74 which apply here by virtue of sub-rule (8) of that rule, see *Masotsha vs. Masotsha* 1960 (1) N.A.C. 13 (S), at page 15. As the merits of the application for rescission were not gone into in the Native Commissioner's Court and the application was refused by it on wrong premises, the refusal falls to be set aside and the applications remitted to that Court for hearing on the merits and for a fresh judgment thereon.

The appeal should accordingly be sustained, with costs, and the judgment of the Native Commissioner's Court refusing the application for rescission should be set aside and the application remitted to that Court for hearing on the merits and a fresh judgment thereon.

Yates and Collen, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.
For Respondents: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

JENI vs. **XINABANTU.**

N.A.C. CASE No. 28 OF 1961.

UMTATA: 27th September, 1961. Before Balk, President, Yates and Midgley, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—Pleadings in Chief's Court—Effect on appeal to Native Commissioner's Court. Incidence of onus of proof. Onus to begin adducing evidence—Effect on appeal of erroneous ruling in Native Commissioner's Court.

NATIVE CUSTOM.

Stock advanced to husband for dowry—When returnable. Dowry "eater's" responsibility to provide for ward.

Summary: The plaintiff (now respondent) obtained judgment for a beast and costs in a Chief's Court in which he sued the defendant (present appellant) for a horse averring that he had given it to the defendant to pay dowry for his (defendant's) wife and that the defendant had undertaken to refund it on demand.

In his plea in that Court the defendant admitted that he had been given the horse for the purpose stated by the plaintiff but alleged that it had been agreed that in lieu of refunding it he was to provide for the plaintiff's married sister.

On appeal to the Native Commissioner's Court the pleadings in the Chief's Court were not restated. The Native Commissioner ruled that it was for the defendant to commence adducing evidence as the onus of proving the arrangement relied upon in his plea rested on him.

The evidence for the plaintiff in the Native Commissioner's Court revealed that he had not advanced his claim to be reimbursed for the horse until some five years after defendant's eldest daughter's second marriage and in explaining this delay plaintiff testified that according to custom a reimbursement was not made in respect of a contribution by a third person towards dowry paid by a man for his wife until the cattle paid for that man's daughter's dowry had calved.

The Native Commissioner upheld the Chief's judgment and the defendant appealed to this Court.

Held: That, where pleadings in a Chief's Court are not restated in a Native Commissioner's Court on eppeal, such pleadings stand.

Held further: That, as the arrangement relied upon by the defendant in his plea was inconsistent with the averment in the particulars of the plaintiff's claim in this respect, that averment must, in terms of Rule 45 (8) of the Rules for Native Commissioner's Courts, be deemed to have been denied by the defendant and the onus of proof on the pleadings, therefore, rested on the plaintiff; and consequently it was for the plaintiff to have adduced evidence first in the Native Commissioner's Court in terms of Rule 53 (7) (*a*) of those Rules.

Held further: That, as it was not shown that the Native Commissioner's erroneous ruling in respect of the onus to commence adducing evidence resulted in substantial prejudice to the defendant, the error became a mere technicality at this, the appeal, stage and the appeal could not succeed on this ground, this position being entrenched by the proviso to section *fifteen* of the Native Administration Act, 1927.

Held further: That, the plaintiff's explanation for the lengthy delay in claiming reimbursement for the horse, viz., that according to custom reimbursement is not made in respect of a contribution by a third person towards dowry paid by a man for his wife until the cattle paid for that man's daughter's dowry have calved, was quite untenable as custom entitled a contributor to claim reimbursement as soon as the dowry has been received for the daughter.

Held further: That, an arrangement that in lieu of the husband refunding a contribution by another towards the dowry of his wife, the husband was to provide for the contributor's married sister was foreign to custom as the responsibility to provide for a married girl both by way of customary gifts or when she was in need remained with the "eater" of her dowry and was not passed on to another by him.

Cases referred to:

Malufahla vs. Kalankomo 1955 N.A.C. 95 (S), at page 96.

Statutes etc. referred to:

Rule 53 (7) (*a*) of the Rules for Native Commissioner's Courts.

Balk (President):

The plaintiff (now respondent) obtained judgment for a beast and costs in a Chief's Court in which he sued the defendant (present appellant) for a horse averring that he had given it to the defendant to pay dowry for his wife and that the defendant had undertaken to refund it on demand.

In his plea in that Court the defendant admitted he had been given the horse for the purpose stated by the plaintiff but alleged that it had been agreed that in lieu of refunding it he was to provide for the plaintiff's sister.

On appeal by the defendant to the Native Commissioner's Court, the Chief's judgment was upheld but amplified so as to provide for the payment to the plaintiff of the value of the beast in the sum of R20.00 as an alternative to its restoration to him by the defendant who was ordered to pay the costs of appeal.

The appeal to this Court from the Native Commissioner's judgment is brought on the following grounds:—

> "1. That the judgment was bad in law in that the Court erred in ruling at the commencement of the trial that the onus was upon the Defendant to begin, and by reason of such misplacement of the onus, the defendant was irreparably prejudiced.
>
> 2. That the Court erred in refusing a postponement to enable the Defendant to call further evidence and in consequence of which refusal the Defendant was obliged prematurely to close his case and was thus prejudiced in the conduct of his case. The Court should have exercised its judicial discretion and allowed the postponement.
>
> 3. The whole judgment is against the evidence, the weight thereof, the facts found proved, the probabilities of the case and the circumstances thereof."

The pleadings in the Chief's Court, as reflected in the Chief's written record, were not restated in the Native Commissioner's Court so that they stand, see *Malufahla vs. Kalankomo* 1955 N.A.C. 95 (S), at page 96.

In ruling that it was for the defendant to begin adducing evidence in his Court as the onus of proving the arrangement relied upon in his plea rested on him, the Native Commissioner lost sight of the true position as regards the incidence of the onus of proof emerging from the pleadings; for the arrangement relied upon by the defendant in his plea viz., that it had been agreed that the defendant was in lieu of refunding the horse to the plaintiff to provide for the plaintiff's sister, is inconsistent with the averment in the particulars of the plaintiff's claim that the defendant had promised to refund the horse to him on demand so that this averment by the plaintiff must, in terms of Rule 45 (8) of the Rules for Native Commissioner's Courts, be deemed to have been denied by the defendant and the onus of proof on the pleadings, therefore, rested on the plaintiff. Consequently, it was for him to have adduced evidence first in the Native Commissioner's Court in terms of Rule 53 (7) (*a*) of those rules. Mr. Muggleston who appeared for the appellant in this Court, conceded that he was unable to show that the Native Commissioner's erroneous ruling in this respect resulted in substantial prejudice to the defendant so that the error becomes a mere technicality at this, the appeal, stage and the appeal cannot succeed on this ground. This position is entrenched by the proviso to section *fifteen* of the Native Administration Act, 1927.

Mr. Muggleston correctly did not support the second ground of appeal as there is no substance therein in that the only reason advanced in respect of the application for the postponement by the defendant's attorney in the Native Commissioner's Court was that he still had one witness to call and it was not shown that it was through no fault on the part of the defendant that the witness was not then available as should have been done before the Court could be expected to exercise its discretion in the defendant's favour, see *Mjali vs. Mkabayi* 1957 N.A.C. 23 (S), at page 24.

Turning to the remaining ground of appeal it is, as stressed by Mr. Muggleston, manifest from the plaintiff's evidence that he did not claim to be reimbursed for the horse until some five years after the defendant's eldest daughter's second marriage; and his explanation for this lengthy delay viz., that according to custom reimbursement is not made in respect of a contribution by a third person towards dowry paid by a man for his wife until the cattle paid for his daughter's dowry have calved, is quite untenable as custom entitles a contributor to claim reimbursement as soon as the dowry has been received for the daughter. Moreover, the plaintiff was at first unable to reply to the question put to him in the course of his evidence in the Native Commissioner's Court whether it was to be understood that the cattle paid in respect of the second marriage of the defendant's eldest daughter had not calved for five years and his eventual reply that he did not take notice when the dowry cattle had calved and that he had not gone himself but sent a messenger serves to accentuate the lameness of his explanation for the lengthy delay in advancing his claim. There are also inconsistencies in the evidence of the plaintiff's witnesses as regards when the plaintiff first made his claim.

It seems to me, however, that the lengthy delay by the plaintiff in bringing his claim was due to mere tardiness and that his fictitious explanation for this delay amounted to no more than a lame excuse and did not in fact lend colour to the defendant's case. That this is so will be apparent from what follows. The plaintiff's evidence that the arrangement was that the horse was to be refunded from the dowry paid for the defendant's eldest daughter is supported by his witness, Mcunugelwa, and accords with custom whereas the arrangement relied upon by the defendant, viz., that in lieu of refunding the horse he was to provide for the plaintiff's married sister is entirely foreign to custom as the responsibility to provide for a married girl both by way of customary gifts and when she is in need remains with the "eater" of the dowry and is not passed on to another by him. Moreover, it is most unlikely that the defendant would have undertaken such a heavy responsibility in return for only one horse. It follows that the defendant's evidence that the arrangement contended for by him was a common one confirms that the alleged arrangement is a fabrication.

Then, there is an inconsistency in the defendant's evidence as regards whether the plaintiff agreed at a meeting held subsequent to his sister's death to accept a beast in lieu of the horse on the basis that the horse was regarded as equivalent to two head of cattle and that one head was set off in view of the defendant's having given certain articles to the plaintiff's sister. This inconsistency is vital in that it not only makes the defendant's evidence suspect but also that of his only witness other than himself i.e., Zakhele, in view of the latter's evidence that the plaintiff at the meeting had agreed to accept a beast in lieu of the horse on the basis testified to by the defendant in his evidence in chief and contradicted by him in cross-examination.

Again, as pointed out by the Native Commissioner in his reasons for judgment and stressed by Mr. Airey in his argument for the respondent, it is improbable that the defendant would have given his own wife's wedding outfit to the plaintiff's sister as testified to by him.

In addition there is a blatant discrepancy between the defendant's evidence and that of Zakhele as to the articles alleged to have been given by the former to the plaintiff's sister.

In the circumstances there can, to my mind, be no doubt that the plaintiff discharged the onus of proof resting on him on the pleadings on a balance of probability so that the last ground of appeal also fails and the appeal should, accordingly, be dismissed, with costs.

Yates and Midgley, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.
For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

NKABALAZA AND TWO OTHERS vs. MEJI.

N.A.C. CASE No. 29 OF 1961.

UMTATA: 27th September, 1961. Before Balk, President, Yates and Midgley, Members of the Court.

NATIVE CUSTOM.

Bopa *beast distinguished from* Isihewula *beast.*

Summary: A Native Commissioner's Court entered judgment for plaintiff (now respondent) for R50.00, with costs, in an action in which he sued the three defendants (present appellants) for £30 being the value of a certain ox which he alleged was his property and had been spoliated and slaughtered by the defendants acting in concert.

It was common cause that the beast had been spoliated and slaughtered but the defendants denied that they were responsible, stating that the beast had been taken by a group of women.

The second defendant testified that the ox had been taken by the women as a *bopa* beast whereas the first defendant stated that it had been taken as an *isihewula* beast.

per curiam: "A *bopa* beast belongs to the dowry "eater" and is not taken by the women of the seduced girl's kraal as in the case of an *isihewula* beast . . . even if the beast be taken as an *isihewula* beast its owner is entitled to recover its value where it was taken and slaughtered against his consent, see *Mngcangceni vs. Ndlangisa* 1959 N.A.C. (S) at page 37."

Cases referred to:

Mngcangceni vs. Ndlangisa 1959 N.A.C. 34 (S) at page 37.

Yates aind Midgley, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.
For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

SEBONI vs. **NDAMSE.**

N.A.C. CASE No. 23 OF 1961.

KING WILLIAM'S TOWN: 24th October, 1961. Before Balk, President, Yates and Moll, Members of the Court.

PRACTICE AND PROCEDURE.

Recalling by plaintiff of witnesses to rebut defence evidence not put to them in cross-examination.

The following is an excerpt from the President's judgment, the remainder of that judgment not being material to this report:—

> "Admittedly, as stressed by Mr. Stanford, Shongwe was asked to testify and produced as a witness at the last moment and his evidence was not put to the plaintiff's witnesses, Mazwai and his wife, as ought to have been done nor was Shongwe mentioned by the defendant in his evidence as one would have expected. But the fact remains that Shongwe's evidence that he was present in Mazwai's house during the conversation remained uncontroverted notwithstanding that it was open to the plaintiff's Attorney to have applied to the Court for permission to recall Mazwai and his wife for that purpose. In this connection the following passage in *Cuba vs. Qundane* (Case No. N.A.C. 40/59 heard by this Court at King William's Town on the 22nd February, 1960—not reported) is apposite.
>
> > 'Turning to the application by the plaintiff's attorney to recall his witnesses, this was a matter in the Native Commissioner's discretion in terms of rule 53 (12) of the Rules for Native Commissioner's Courts. In my view the Native Commissioner exercised a proper discretion in acceeding to the application as the nature of the evidence upon which the defence relied was not put to the plaintiff's witnesses in cross-examination, i.e. the defence's evidence relating to Hayi's presence at the alleged rejection of Nomama by the defendant and to Dyasi's having seen Nomama and Mapelo walking arm in arm and kissing each other; and it is one of the duties of a cross-examiner, in circumstances like the present, to put to each witness concerned, openly and fairly, the evidence which the cross-examiner proposes to lead later in order that the witness may have a proper opportunity of giving his evidence upon the subject, see *Holland vs. Piccione* 29 P.H., F. 21 (N.P.D.)'.
>
> It follows that there is no justification for holding that Shongwe was imported by the defendant to bolster up his case by bearing false testimony."

Yates and Moll, Members, concurred.

For Appellant: Mr. R. Stanford of King William's Town.

For Respondent: Mr. D. Allison of King William's Town.

SOUTHERN NATIVE APPEAL COURT.

MBULI vs. MEHLOMAKULU.

N.A.C. CASE No. 27 OF 1961.

KING WILLIAM'S TOWN: 23rd October, 1961. Before Balk, President, Yates and Moll, Members of the Court.

CONFLICT OF LAWS.

Action for custody of child—System of law to be applied—Considerations.

Summary: This was an appeal from the judgment of a Native Commissioner's Court declaring the plaintiff (now respondent) to be the guardian of her illegitimate child and entitled to its custody and the delivery of a Post Office Savings Bank book in respect of funds standing to the child's credit, in an action which the plaintiff brought against her father, the defendant (present appellant) in these respects.

It was not disputed that the plaintiff was the defendant's daughter by a civil marriage, that she was a teacher by profession, that the child was her illegitimate daughter by one, Lerotoli, that the plaintiff was a major at the time of birth of the child, that she had, subsequent to the birth of the child, entered into a civil marriage with another man who had paid dowry to the defendant for her, that Lerotoli paid six head of cattle to the defendant as damages in accordance with Native law and custom in respect of the plaintiff's seduction and pregnancy which resulted in the child's birth, after the defendant had brought an action against him, that Lerotoli had never taken any interest in the child and that the plaintiff had given to the child from her savings the R440.00 standing to its credit in the Post Office Savings book.

The appeal was brought on grounds which resolved themselves to this that the Native Commissioner erred in applying common law in deciding the case and should have applied Native law instead.

Held: That, the fact that the defendant had sued and obtained from Lerotoli damages under Native law in respect of the plaintiff's seduction and pregnancy coupled with the fact that the plaintiff was a major at the time and had not instituted an action against Lerotoli in this respect did not necessarily justify an inference that these factors showed an adherence to Native law and custom by both parties as regards the child's status, as the plaintiff did not appear to have been asked in the course of her evidence whether she had acquiesced in the defendant suing Lerotoli for the damages in question and if so why she had done so, nor did she appear to have been questioned as to why she herself had not sued Lerotoli on this score.

Held further: That, the fact that dowry had been paid for the plaintiff to the defendant by her husband could also not properly be held to show an adherence to Native law and custom by her as she was not questioned in regard to her attitude thereanent and any acquiescence on her part in the payment of the dowry might have been prompted solely by her desire to retain harmonious relations with her father.

Held further: That, the fact that the plaintiff was the defendant's child by a civil marriage according to Christian rites, that the plaintiff had contracted such a marriage and that the child had been baptised in church indicated a departure by the parties from Native law and custom and were therefore factors affecting their outlook.

Held further: That, in actions concerned with the custody of a child, the question of the application of common law or Native law and custom falls to be decided not solely on the basis of which legal system it would in all the circumstances of the case be fairest to give effect to as between the parties but that the dictates of public policy fall to be borne in mind in the light of the first proviso to section 2 (1) of the Native Administration Act, 1927, which precludes the application of Native law when it is contrary to the principles of public policy or natural justice.

Statutes etc. referred to:

Section 2 (1) of the Native Administration Act, 1927.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court declaring the plaintiff (now respondent) to be the guardian of her child, Lumbulelo (hereinafter referred to as "the child"), and entitled to its custody and the delivery of the Post Office Savings Bank book in respect of the funds standing to the child's credit, in an action which the plaintiff brought against her father, the defendant (present appellant), in these respects.

The defendant pleaded specially that the plaintiff's summons did not disclose a cause of action in that she was not in law entitled to claim the guardianship and custody of the child. He also filed an alternative plea. It is, however, unnecessary to set it out as nothing of importance turns on it.

The grounds of appeal resolve themselves to this that the Native Commissioner erred in applying common law in deciding the case and should have applied Native law instead.

It is not disputed that the plaintiff is the defendant's daughter by a civil marriage, that she is e teacher by profession, that the child is her illegitimate daughter by one, Lerotoli, that the plaintiff had, subsequent to the birth of the child, entered into a civil marriage with another man who had paid dowry to the defendant for her, that Lerotoli paid six head of cattle to the defendant as damages in accordance with Native law and custom in respect of the plaintiff's seduction and pregnancy which resulted in the child's birth, after the defendant had brought an action against him, that Lerotoli had never taken any interest in the child and that the plaintiff had given to the child from her savings the R440 standing to its credit in the Post Office Savings Bank.

The Native Commissioner based his decision to apply common law on his finding that the parties had aligned themselves to this the more advanced legal system as evidenced by these facts, viz., that the plaintiff was the defendant's daughter not by a customary union but by a civil marriage, that she was a teacher by profession and had contributed very substantially towards the material welfare of the child, that the child had been baptised in church and that the plaintiff had also entered into a civil marriage. The Native Commissioner also took into account the interest and welfare of the child. In this connection he pointed out that the plaintiff was a devoted mother, that she possessed adequate means to provide for her child and that she was comparatively well educated and in a position to care for and provide for the education of the child whereas the defendant on the other hand was quite willing to allow the child to go to strange surroundings in Basutoland should it be claimed by its natural father who lived there and had not seen the child or made any contribution towards its support or welfare.

It followed from the application by the Native Commissioner of common law in deciding the case that the Plaintiff in accordance with that legal system fell to be regarded as the guardian of the child and as such entitled to its custody as also to the Post Office Savings Bank book, and that the specially pleaded defence failed as its success was contingent upon the application of Native law and custom under which the defendant was entitled to retain the custody of the child as against the plaintiff as under that legal system the plaintiff has no rights to the child.

At the inception of his argument Counsel for appellant took the point that the Native Commissioner had misdirected himself in deciding to apply common law merely because the plaintiff sought a remedy under that legal system. But it is clear from the Native Commissioner's reasons for judgment that this decision amounted to no more than an indication that common law would provisionally be regarded as applicable and appears to have been prompted by the passage in *Ex Parte Minister of Native Affairs in re Yako vs. Beyi* 1948 (1) S.A. 388 (A.D.), at page 397, that it would probably be convenient in many cases for the Native Commissioner to indicate possibly even at the commencement of the trial what law he would provisionally regard as applicable. Counsel took the further point that in any event this was not an appropriate case for the Native Commissioner to give such an indication seeing that the decision of the case was wholly contingent upon the application of the one legal system or the other i.e. common law or Native law and custom. That may be so but it seems clear to me from the Native Commissioner's reasons for judgment that he was not influenced by his provisional ruling so that no substantial prejudice to the defendant appears to have resulted therefrom and it does not, therefore, affect the outcome of the appeal regard being had to the proviso to section *fifteen* of the Native Administration Act, 1927, that no judgment or proceedings shall by reason of any irregularity or defect in the record or proceedings, be reversed or set aside by the Native Appeal Court unless it appears to it that substantial prejudice has resulted therefrom.

Counsel also submitted that the Native Commissioner's note of record "The Judicial Officer indicates at the outset that he proposes applying Common Law" which was made before any evidence was adduced, showed that he had misdirected himself in that it was clear from the record that he had in fact finally decided to apply common law when he made the note and that his decision here was not as stated subsequently in his written reasons for judgment given in response to the notice of appeal only a provisional one.

In my judgment there is no substance whatsoever in this submission. That this is so is apparent if the Native Commissioner's note is viewed in its proper perspective. Admittedly, the note is not happily worded but there can be little doubt that the Native Commissioner intended to convey thereby that common law was to apply provisionally for not only, as pointed out by Mr. Attorney Barnes in his argument on behalf of the respondent, do his reasons indicate that he gave most careful consideration to the evidence before deciding which legal system to apply but the fact that he proceeded to hear the evidence after making the note is a clear indication that his ruling to apply common law at that stage was provisional and not final as in the latter event there would have been no object in hearing any evidence.

Counsel contended that the fact that the defendant had sued and obtained from Lerotoli damages under Native law in respect of the plaintiff's seduction and pregnancy coupled with the fact that the plaintiff was a major at the time and had not instituted an action against Lerotoli in this respect showed that the defendant held the right of guardianship of the child. But in putting forward this contention Counsel lost sight of the fact that according to Native law and custom the defendant had by

obliging Lerotoli to pay damages for the plaintiff's seduction and pregnancy lost to Lerotoli all his rights in respect of the child, including guardianship, and was left only with his right to retain the child until its natural father claimed it and paid the *isondlo* beast, see *Moyeki vs. Qutu* 1961 (1) N.A.C. 10 (S), at pages 11 and 12 and the authorities there cited.

Counsel further contended that the factors mentioned in the last preceding paragraph showed an adherence to Native law and custom by both parties as regards the child's status which called for the exercise by the Native Commissioner of his discretion in favour of that system of law. The plaintiff does not, however, appear to have been asked in the course of her evidence whether she had acquiesced in the defendant suing Lerotoli for the damages in question and, if so, why she had done so; nor does she appear to have been questioned as to why she herself did not sue Lerotoli on this score. Had these questions been put to her, she may have been able to give explanations indicating that she had not adhered to Native law and custom in connection with these aspects so that an inference to the contrary is not justified. In connection with Counsel's further argument that the plaintiff's statement that she had "borrowed" the child indicated that she had recognised the defendant's right to it, it seems to me that by the word "borrowed" the plaintiff may well have intended to convey no more than that she took the child from the defendant because she needed it to assist her with the child of her marriage. In any event it would appear that this word was used loosely by both parties to denote the mere taking of the child as the defendant also used it in this sense in his evidence saying that he had "borrowed" the child back from the plaintiff.

The fact that dowry was paid for the plaintiff to the defendant by her husband also relied upon by Counsel can also not properly be held to show an adherence to Native law and custom by her as she was not questioned in regard to her attitude thereanent and any acquiescence on her part in the payment of the dowry may have been prompted solely by her desire to retain harmonious relations with her father, the defendant.

Counsel submitted that certain facts, viz., that the plaintiff was the defendant's child by a civil marriage according to Christian rites, that the plaintiff had contracted such a marriage and that the child had been baptised in church, were irrelevant. I am, however, unable to share this view as the marriages and the baptism undoubtedly indicate a departure by the parties from Native law and custom and are therefore factors affecting their outlook.

In my opinion the point taken by Counsel that in Native law an illegitimate child is absorbed into the mother's family and so assured of proper care which does not obtain at common law, is not of any real importance here regard being had to the fact that the plaintiff is the mother of the child, that her husband is in favour of her having the child and that they are in a position to provide for it adequately so that it is assured of proper care.

As we are here concerned with the custody of a child, it seems to me that the question of the application of common law or Native law and custom falls to be decided not solely on the basis of which legal system it would in all the circumstances of the case be fairest to give effect to as between the parties but that the dictates of public policy fall to be borne in mind in the light of the first proviso to section 11 (1) of the Native Administration Act, 1927, which precludes the application of Native law where it is contrary to the principles of public policy or natural justice. This aspect gives rise to the question whether it would be in the best interests of the child to award its guardianship and custody to the plaintiff or to the defendant.

There are factors favouring the defendant's claim on this basis, viz., that the child has been with the defendant since the plaintiff's marriage in 1952 except for two years i.e. 1956 and 1957, when she had it, and the defendant appears to have looked after the child properly and is in a position to provide for it; for in general it is undesireable to uproot a child from a suitable environment. There are, however, weighty counter-considerations, viz., that the child, a girl of eleven years, would if its guardianship and custody are awarded to the plaintiff be going to its mother who has shown her close attachment to it as evidenced by the generous provision she made for it in the Post Office Savings Bank book from her savings and generally from the way she provided and cared for its welfare which together with her evidence as a whole make it manifest that she wants to have the child because of her love for it as a mother and not for any ulterior motive; further, her husband is agreeable to her having the child and they are in a position to provide for it, including its education, adequately.

To my mind, however, the paramount consideration here is that by awarding the guardianship and custody of the child to the plaintiff its future would be assured whereas the position would be otherwise if the award were made to the defendant as in that event the latter could not, as was conceded by him in the course of his evidence, resist a claim under Native law and custom by the natural father for the child's custody regard being had to the fact that the defendant could not rely on the common law as all his rights to the child flow from Native law and custom and bearing in mind that the natural father of the child paid the full damages for the plaintiff's seduction and pregnancy which, in Native law, entitles him to claim the child at any time notwithstanding that he has shown no interest whatsoever in it; and in the event of his death it is competent for his heir to make the same claim. On the other hand if the plaintiff obtains the guardianship and custody of the child, a judgment awarding the child to its natural father in an action brought by him against the defendant would not be binding on her unless she had been joined therein; and in that event it would be open to her to rely on common law, this being the system by which her rights to the child are governed and in support of her contention that this legal system should be applied she could rely on the fact that the natural father of the child had taken no interest in it over a lengthy period so that her contention could hardly fail. This fact could not of course be relied upon by the defendant in that it is not relevant in Native law and custom under which it is competent for the natural father or his heir to claim a child at any time irrespective of what may be in the child's interests provided he has paid the full damages for the seduction and pregnancy of the child's mother and he pays the *isondlo* beast.

It follows that the Native Commissioner cannot be said to have erred in having applied common law in deciding the case and the appeal should accordingly be dismissed, with costs.

Yates and Moll, Members, concurred.

For Appellant: Adv. T. Mullins of Grahamstown.

For Respondent: Mr. B. Barnes of King William's Town.

NORTH-EASTERN NATIVE APPEAL COURT.

NKGADIMA vs. NKGUDI.

N.A.C. CASE No. 27 OF 1961.

PIETERMARITZBURG: 20th November, 1961. Before Cowan, President; King and Venter, Members.

PRACTICE AND PROCEDURE.

Non-stamping of documents.

Summary: The merits of this case are not relevant to this report. In argument on appeal the Court's attention was directed to the fact that a certain stage of proceedings reinstatement of the proceedings was applied for and the application was not stamped in accordance with Item 7 of Table C of the Second Annexure to the Native Commissioner's Court rules. Counsel cited the case of *Ochse vs. Prinsloo* 1946 C.P.D. 14 and urged that, being unstamped, the document was a nullity and that consequently all the proceedings before the Native Commissioner on that day were invalid. On referring to the record the Court found that a notice of application to rescind a default judgment entered on 21st April, 1958, had also not been stamped as required by Item 3 of Table C.

Held: For reasons which appear more clearly from the extract from the President's judgment which is quoted below that the proceedings were not invalid.

Held further: That as there was no reason to believe that fraud or evasion of duty was intended in respect of the application to rescind and as the point had not been raised by either party but by the Court, the position would be met by the Court directing that it be stamped as required by section 32 of the Stamp Duties and Fees Act (No. 30 of 1911).

Statutes referred to:

Table C of the Second Annexure to the Native Commissioner's Court rules Items 3 and 7.

Rule 85 (2) of the Native Commissioner's Court rules.

Act 30 of 1911, section 32.

Cases referred to:

Ochse vs. Prinsloo, 1946 C.P.D. 14.

Cowan, President: (Only the relevant portion of the judgment is quoted).

Mr. Soggot then drew the Court's attention to the fact that the notice purporting to re-instate the action on the Native Commissioner's Court's roll for hearing on the 23rd November, 1960, was unstamped. He claimed that, in accordance with Item 7 of Table C of the Second Annexure to the Native Commissioner's Court's Rules, the notice should have been stamped with a 1s. Revenue stamp and asked this Court to hold, citing the case of *Ochse vs. Prinsloo,* 1946 *O.P.D.* 14 as his authority, that, being unstamped, that document was a nullity and that consequently all the proceedings before the Native Commissioner on that day were invalid. On referring to the record the Court found that the notice of the application to rescind the default judgment entered on the 21st April, 1958, had also not been stamped (as required by Item 3 of Table C).

After hearing argument the Court reserved its ruling on this point.

Item 7 of Table C provides that a "notice of re-instatement of any action, application or matter postponed *sine die*" must be stamped with a 1s. stamp. In the view which we take of the matter the notice in question does not fall within the class of notices referred to in Item 7. This item prescribes a fee for the re-instatement for further hearing in terms of Rule 85 (2) of actions, applications or matters which have been postponed *sine die*. But this action had not been postponed *sine die* and it cannot be held, therefore, that the notice was in respect of the re-instatement of an action so postponed. Whether the action lapsed because of the fact that it had not been formally postponed and, if so, whether it could not in the circumstances be re-instated merely by notice we are not now called upon to decide. It suffices merely to reject Mr. Soggot's contention that the proceedings before the Native Commissioner on the 23rd November, 1960, were invalid because the notice purporting to re-instate the action was unstamped.

As the non-stamping of the notice of application to rescind the default judgment was not raised by either of the parties but by the Court itself and as we have no reason to believe that fraud or evasion of duty was intended we do not propose to take this matter any further other than to direct that the document be stamped as required by section *thirty-two* of the Stamp Duties and Fees Act (Act No. 30 of 1911).

King and Venter, Members, concur.

For Appellant: Adv. D. Soggot.

For Respondent: Adv. I. W. D. de Villiers.

NORTH-EASTERN NATIVE APPEAL COURT.

KUMALO vs. **MOLEFE.**

N.A.C. CASE No. 52 OF 1961.

PIETERMARITZBURG: 28th November, 1961. Before Cowan, President; Richards and Ahrens, Members of the Court.

PRACTICE AND PROCEDURE.

Chief trying a case which arose out of a statutory provision.

Summary: Defendant impounded plaintiff's horses in terms of the Pound Ordinance No. 32 of 1947 (Natal). Thereafter plaintiff sued defendant before a Chief for £10 damages for "wrongful and unlawful impounding of the plaintiff's horses without informing plaintiff". The Chief awarded him £10 damages.

Held: That as defendant had exercised his statutory right to impound the horses it was not open to the Chief to find against him for failing to observe Native Custom in the matter. The claim, in the circumstances, was not one arising out of Native law and custom and the Chief had no jurisdiction to try the case.

Held further: That as the point of jurisdiction was not taken by appellant (defendant) in the Native Commissioner's Court, there would be no order for costs in that Court.

Statutes referred to:

Natal Pound Ordinance No. 32 of 1947.

Case referred to:

Gazu vs. Ndawonde 1954 N.A.C. 142.

Cowan, President:

The respondent, who was the plaintiff in the Chief's court, claimed the sum of £10 damages against the present appellant for the "wrongful and unlawful impounding of the plaintiff's horses without informing plaintiff". The defendant's reply to the claim is recorded as being an admission of the impounding of the horses but a denial of liability. The Chief gave judgment for £10 damages and £3. 17s. costs. His reasons for judgment were simply that "Plaintiff (presumably he intended the defendant) admits impounding plaintiff's horses".

The case was taken on appeal to the Native Commissioner who found that the horses belonged to the plaintiff and grazed in the same grazing ground as the defendant's stock; that they had trespassed in the defendant's arable allotment and were impounded by him without his having given the plaintiff notice of his intention to do so; that two of the horses were branded with the brand of the plaintiff which is a registered brand, the third being a foal running with its branded mother and that the plaintiff was the defendant's neighbour. He dismissed the appeal but reduced the judgment of the Chief to one for £5 (R10) damages and costs.

As happens all too frequently nowadays, this matter now comes before this Court by way of an application for the condonation of the late noting of an appeal. The delay was not occasioned by any fault of the appellant himself but was due to the neglect of his attorney to ensure that the notice of appeal was timeously stamped. Condonation was granted.

The grounds of appeal are:—

1. That the said judgment is against the weight of the evidence.
2. That the learned Native Commissioner erred in finding that the respondent is a "neighbour" of the appellant in terms of section 16 of the Pound Ordinance, No. 32 of 1947.

The right to impound cattle found trespassing on land in Natal flows from the Pound Ordinance, 1947 (Ordinance No. 32 of 1947). It was open to the defendant either to make use of the right given to him by the Ordinance to impound the horses or to follow the recognised steps prescribed by Native custom. He chose to exercise his statutory right to impound the horses and it was, therefore, not open to the Chief to find against him for failing to observe Native custom in the matter. The claim, one for damages for the wrongful and unlawful impounding of the horses was not, in fact, one arising out of Native law and custom and consequently the Chief had no jurisdiction to try the case.

In hearing the appeal the Native Commissioner applied the provisions of the Pound Ordinance to the case. But he was not entitled to do so as an appeal from a Chief's Court may only be heard under Native law and custom as a Chief's jurisdiction is restricted to claims arising out of such law and custom—see the case of *Gazu vs. Ndawonde*, 1954 N.A.C. 142.

For these reasons it becomes unnecessary for this Court to give a decision on the grounds mentioned in the notice of appeal and the appeal will be allowed with costs and the Native Commissioner's judgment altered to one of "Appeal allowed and the Chief's judgment altered to 'Claim dismissed with costs'".

As the point of jurisdiction was not taken by the appellant in the Native Commissioner's court there will be no order as to costs in that court.

Richards and Ahrens, Members, concur.

For Appellant: Adv. J. Niehaus.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

NDLOVU vs. **NTABENI.**

N.A.C. CASE No. 61 OF 1961.

PIETERMARITZBURG: 29th November, 1961. Before Cowan, President; Richards and Ahrens, Members.

MAINTENANCE.

Claim under common law.

NATIVE LAW.

Claim for isondhlo.

Summary: Defendant and a woman Idah were partners in a customary union and two children were born to them in 1936 and 1941 respectively. The union was subsequently dissolved in 1941 and it was ordered that their custody be awarded to defendant after they had attained the age of seven years. Ida subsequently married the plaintiff and went to live at his kraal with the two children. In 1959 the plaintiff issued summons against defendant in which he claimed from defendant the delivery of 30 head of cattle or their value £150 being two head for *isondhlo* in respect of the children and 28 head or their value £140 for the estimated expenses incurred by him in respect of their upbringing and maintenance until they reached the ages of 18 years respectively. Defendant did not demand the return of the children in terms of the order made at dissolution of the customary union.

Held: That as plaintiff had reared the children voluntarily and without prior arrangement with defendant he had no claim under Common law to be recompensed.

Held further: That in the circumstances of this case plaintiff was entitled to recover *isondhlo* under Native law.

Cases referred to:

Mkize vs. Mdungu, 1939 N.A.C. (T. & N.) 107.

Cele vs. Cele, 1947 N.A.C. (T. & N.) 2.

Schreiber vs. Paper, 1906 E.D.C. 34.

Mbongwa vs. Mbongwa, 1 N.A.C. (N.E.) 338.

Cowan, President:

The defendant and a woman, Idah, were partners in a Native customary union which was dissolved in 1941. There were two children of the union, a girl born in 1936 and a boy born in 1941, and it was ordered that their custody be awarded to the defendant after they had attained the age of seven years. Idah returned to her kraal-head, Amos Dhlamini, and subsequently, in 1945, married the plaintiff and went to live at his kraal with the two children.

In September, 1959, the plaintiff issued a summons in which he claimed from the defendant the delivery of 30 head of cattle or their value £150 being two head for *isondhlo* in respect of the children and 28 head, or their value £140, for the estimated expenses incurred by him in respect of their upbringing and maintenance until they reached the age of 18 years respectively. In his plea, the defendant, except for admitting that he was the father of the two children, denied generally all the allegations in the summons and averred that there was no contract express or implied entered into between him and the plaintiff in regard to the maintenance of the children and averred further that if the Court held that the plaintiff did make contributions to the successful upbringing of the children (which he denied) he did so without the defendant's knowledge and consent and contrary to his wishes.

The Native Commisioner found, and the evidence supports these findings, that the children had gone to live at the plaintiff's home with the consent of Idah's then kraal-head i.e. Amos and that the defendant was aware of this. He entered judgment for the plaintiff with costs for two head of *isondhlo* cattle or their value R20 and for R54 and R72 in respect of maintenance of the girl and the boy respectively. These latter amounts were based on maintenance at the rate of 50 cents per child per month which he considered was the least that it could have cost the plaintiff to rear the children.

The defendant appealed against the whole of this judgment on the following grounds:—

1.

That the judgment is contrary to law and is against the weight of evidence.

2.

That the learned Assistant Native Commissioner erred in not indicating at any stage in the proceedings which system of law he would apply or had applied in determining the suit in question.

3.

That the learned Assistant Native Commissioner erred in applying both Native custom and Common law in respect of the maintenance of defendant's wards and in making two separate awards under each system of law in respect thereof.

4.

That on the evidence led the learned Assistant Native Commissioner should have held that plaintiff had not proved defendant's liability to him and in any case had not proved any additional expenses or disbursements other than those of rearing defendant's wards.

5.

That the learned Assistant Native Commissioner erred in making an award of R54 maintenance for defendant's daughter and award of R72 for maintenance of defendant's son in addition to his award of two head of *isondhlo* cattle or R20.

Dealing with ground No. 1 of the notice of appeal, Mr. Menge, counsel for the appellant, argued that *isondhlo* is payable only where the ward has been maintained with the knowledge and consent, express or implied, of the guardian and cited as his authority for this argument the cases of *Mkize vs. Mdungu,* 1939, N.A.C. (T. & N.) 107 and *Cele vs. Cele,* 1947 N.A.C. (T. & N.) 2. He maintained that it was the duty of the mother of the children to have returned them to the defendant when they attained the age of seven years respectively and that the defendant's evidence that he had tried to obtain their custody should have been accepted. His second argument, if we understood him correctly, was that *isondhlo* only became payable when the guardian lays claim to the children. He argued, thirdly, that if *isondhlo* was payable by the defendant it was payable only to Amos, the protector of the mother of the children.

The Native Commissioner found that the defendant knew that the children were with the plaintiff and that he had made no real attempt to obtain their custody. This Court is not prepared to say that he is wrong in his finding on these points and we agree with him that the defendant's consent to their being with the plaintiff must be implied. Further, it was his duty to have obtained their custody when he became entitled to it, or at least, to have satisfied himself that they were being adequately maintained.

Having argued that the defendant did lay claim to the children, Mr. Menge, was inconsistent in arguing that no *isondhlo* was payable until such time as he claimed the children. As the children have attained the ages of 26 and 20 years respectively, it cannot be said that the time has not arrived when they have been successfully reared and *isondhlo* becomes payable [See *Cele vs. Cele* (supra)].

We have difficulty in following Mr. Menge's third argument. *Isondhlo* is payable to the maintainer who in this case is the plaintiff.

Mr. Menge abandoned grounds Nos. 2 and 3 and also an application to amplify the original notice of appeal by adding a further ground to the effect that the claim under common law had been prescribed.

As regards Ground 5 of the notice of appeal, it is clear from the Native Commissioner's reasons for judgment that in awarding the sum of R156 maintenance over and above the *isondhlo* beasts he applied common law. While the plaintiff did bring up these children from infancy, it is clear that he did so voluntarily and we know of no principle of the common law under which he can claim to be recompensed for maintaining them nor have we been able to find a case on all fours with this one where such remuneration has been awarded by the Court. It is true that remuneration for maintenance was allowed in the case of *Schreiber vs. Paper* (1906) E.D.C. 34 but the report of that case discloses that the arrangement between the parties was that sooner or later the plaintiff was to receive the child back again. But that case differs from this one in that in this case there was no such arrangement nor had the return of the children been demanded by the defendant.

Holding that there is no claim at Common law for maintenance in the circumstances of this case we arrive at the same decision as this Court did in the case of *Mbongwa vs, Mbongwa,* 1 N.A.C. (N.E.) 338, namely that the plaintiff has no claim to be remunerated under common law.

For these reasons the appeal is allowed in part with costs and the judgment of the Native Commissioner is altered to read "Judgment for plaintiff for two head of *isondhlo* cattle or their value at R10 each with costs."

Richards and Ahrens, Members, concur.

For Appellant: Adv. W. O. H. Menge.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

SIBIYA vs. MTSHALI.

N.A.C. CASE No. 63 OF 1961.

PIETERMARITZBURG: 28th November, 1961. Before Cowan, President; Richards and Ahrens, Members.

PRACTICE AND PROCEDURE.

Practice and Procedure—Native Commissioner's Courts—Jurisdiction—Section 10 (3) *of Act No.* 38 *of* 1927.

Held: That the terms of the proviso to 10 (3) of Act No. 38 of 1927 are peremptory and preclude an inference of consent to jurisdiction by implication. Jurisdiction not conferred on a Native Commissioner by mere agreement of parties unless such agreement in writing.

Statutes referred to:

Section 10 Act No. 38 of 1927.

Section 28 (1) (*c*) Act No. 32 of 1944.

Cowan, President:

The execution creditor, who resides in the district of Vryheid, obtained a judgment in the Court of the Native Commissioner of that district for £210. 4s. 7d. A writ of execution was taken out and twenty-three head of cattle registered in the dipping authorities books in the name of Gwala were attached on the 17th May, 1960. While still under attachment thirteen head of these cattle were transferred to the claimant on the 31st May, 1960, and removed by him from the Mbegamusi dipping tank area to his home at Mkonjeni in the Mkonjeni tank area. Both these areas are in the district of Mahlabatini. The attachment was found to be invalid and was set aside on the 10th June, 1960. These thirteen head of cattle were subsequently re-attached on the 22nd July, 1960, at the Mkonjeni dipping tank by the messenger of the Native Commissioner's Court for the district of Mahlabatini on a fresh warrant issued by the Clerk of the Native Commissioner's Court, Vryheid, on the 10th June, 1960, which was duly endorsed for service in the district of Mahlabatini.

An interpleader summons was taken out in the Court of the Native Commissioner of Vryheid who after hearing evidence declared the cattle to be executable with costs of suit.

The case has now been brought on appeal on the grounds:—

1. That the judgment of the Native Commissioner is against the evidence and bad in law.
2. That the Native Commissioner erred in declaring the cattle executable.
3. That the Court had no jurisdiction to try the matter, and
4. That the claimant did show by evidence that he was the owner of the cattle and the Court should have upheld appellant's claim.

In addressing the Court Counsel for the appellant expressed the opinion that he could not press No. 3 of the grounds of appeal as the point had not been taken in the court below. He did not, however, abandon this ground and as the point is one of jurisdiction this Court must deal with it.

Section *ten* of the Native Administration Act, 1927 (Act No. 38 of 1927), under which Native Commissioner's Courts are constituted, provides that a Court of a Native Commissioner shall not have jurisdiction unless—

(*a*) the defendant or respondent in that case resides or carries on business or is employed in the area of jurisdiction of that court; or

(*b*) the cause of action in that case arose in that area; or

(*c*) the parties to the proceedings in that case have agreed in writing to the Court's jurisdiction.

The parties concerned in the case before us are the execution creditor and the claimant and neither of these can, in our view, be termed the defendant or respondent for the purposes of paragraph (*a*) cited above. But even if it can be argued that as the interpleader summons in a case of this sort is taken out by the Messenger of the Court and that for this reason both the execution creditor and the claimant are the respondents in the matter then in order to found jurisdiction under this paragraph it would still be necessary that both the execution creditor and the claimant should comply with the requirements of paragraph (*a*) and this is not the case here as, while the execution creditor resides in the district of Vryheid, the claimant resides in the district of Mahlabatini. It is evident from the wording of Section *ten* itself that at the time it was framed the legislature did envisage the hearing of interpleader cases between Natives by Native Commissioner's Courts and had it intended to confer jurisdiction upon a Native Commissioner by virtue of the fact that the parties to an interpleader action resided or carried on business or were employed within the area of jurisdiction of such a Native Commissioner one would have expected specific provision for this to be made as is indeed the case in Magistrates' Courts [See Section 28 (1) (*e*) of Act No. 32 of 1944]. We find, therefore, that paragraph (*a*) of Section *ten* did not confer jurisdiction upon the Native Commissioner of Vryheid to hear this action.

Nor could he derive jurisdiction from paragraph (*b*) of that Section as the cause of the action, i.e. the attachment in execution of the cattle, took place in the district of Mahlabatini and not Vryheid.

It was argued by the respondent, who appeared in person, that because the claimant had failed to object to the jurisdiction of the Court this had the same effect as if he had in fact consented to such jurisdiction. Unfortunately for this argument, however, the terms of the proviso to section 10 (3) are peremptory and the legislature has seen fit to require that no jurisdiction shall be conferred on a Native Commissioner by the mere agreement of the parties unless such agreement is in writing. This requirement is clear and unequivocal and automatically precludes an inference of consent by implication.

For these reasons this Court holds that the Native Commissioner had no jurisdiction to try this action. The appeal must succeed on this ground and it becomes unnecessary to consider the remaining grounds of appeal. The appeal is accordingly allowed and the Native Commissioner's judgment is altered to one of "Summons dismissed". There will be no order as to costs in this Court as the point is one which should have been raised in the court below, and there will be no order as to costs in the court below as the summons was issued by the messenger of the court and not the execution creditor and the question of jurisdiction in that Court should have been raised *in limine*.

Richards and Ahrens, Members, concur.

For Appellant: Adv. W. O. H. Menge.

Respondent in person.

VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

1962

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